DOCKET

No. 07-513

Title: Bennie Dean Herring, Petitioner
v.
United States

Docketed: October 18, 2007

Lower Ct: United States Court of Appeals for the Eleventh Circuit

Case Nos.: (06-10795)

Decision Date: July 17, 2007

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 11 2007	Petition for a writ of certiorari filed. (Response due November 19, 2007)
Nov 16 2007	Order extending time to file response to petition to and including December 19, 2007.
Dec 14 2007	Order further extending time to file response to petition to and including January 18, 2007.
Jan 18 2008	Brief of respondent United States in opposition filed.
Jan 30 2008	DISTRIBUTED for Conference of February 15, 2008.
Jan 30 2008	Reply of petitioner Bennie Dean Herring filed. (Distributed)
Feb 19 2008	Petition GRANTED.
Mar 20 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 9, 2008.
Mar 20 2008	The time within which to file respondent's brief on the merits is extended to and including July 21, 2008.
Apr 29 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioner.
May 9 2008	Joint appendix filed. (Statement of costs received).
May 9 2008	Brief of petitioner Bennie Dean Herring filed.
May 16 2008	Brief amici curiae of Electronic Privacy Information Center, et al. filed.
May 16 2008	Brief amici curiae of American Civil Liberties Union, et al. filed.
May 16 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 9 2008	SET FOR ARGUMENT ON Tuesday, October 7, 2008.
Jul 17 2008	CIRCULATED
Jul 21 2008	Brief of respondent United States filed.
Jul 30 2008	Application (08A96) of petitioner for an extension of time to and including August 29, 2008 within which to file the reply brief on the merits, submitted to Justice Thomas.
Aug 5 2008	Application (08A96) of petitioner for an extension of time within which to file the reply brief on the merits, to and including August 29, 2008, granted

by Justice Thomas.

Aug 12 2008 Record received from the U.S.C.A. for the 11th Circuit. 1 envelope.

Aug 13 2008 Record received from the US.D.C. for the Middle District of Alabama. (1 box)

Aug 29 2008 Reply of petitioner Bennie Dean Herring filed. (Distributed).

Oct 7 2008 Argued. For petitioner: Pamela S. Karlan, Stanford, Cal. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. 07-513

IN THE
Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bennie Dean Herring respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in *United States v. Herring*, No. 06-10795.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App. 1a-12a) is published at 492 F.3d 1212. The district court's opinion explaining the denial of petitioner's motion to suppress (App. 13a-18a) is published at 451 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

In *Arizona v. Evans*, 514 U.S. 1 (1995), this Court held that evidence seized incident to an arrest that violates the Fourth Amendment because of a negligent error by a court clerk need not be suppressed in a criminal prosecution. At the same time, this Court expressly reserved the question whether the exclusionary rule would apply to evidence seized incident to an arrest that violates the Fourth Amendment because of a negligent error by *law enforcement* personnel. *Id.* at 16 n.5. This case presents that issue. The Eleventh Circuit held that the exclusionary rule does not apply in such a situation, deepening a substantial conflict over this important question of Fourth Amendment law.

1. On July 7, 2004, Petitioner Bennie Dean Herring traveled to the Coffee County (Alabama) Sheriff's Department to retrieve personal possessions from an impounded vehicle. As petitioner was about to leave, Coffee County Investigator Mark Anderson arrived for work, and another investigator informed him that petitioner was at the station.

Anderson knew petitioner, because petitioner had repeatedly complained to the district attorney and local sheriff that Anderson was responsible for the unsolved murder of a local teenager. Anderson and a sheriff's deputy had visited petitioner's house and pressed petitioner at length to abandon his accusations. The grand jury that was empanelled with respect to the homicide declined to indict Anderson.

Anderson thought that there might be an outstanding warrant for petitioner's arrest. So he

asked Sandy Pope, the Department's employee in charge of tracking warrants, to check the Coffee County warrant database to see if any such warrant existed. Pope did so, and informed Anderson that there were no outstanding warrants for petitioner in Coffee County.

Anderson then asked Pope to call the sheriff's department in neighboring Dale County to see if Dale County had any outstanding warrants for petitioner. Pope telephoned an employee in the Dale County Sheriff's Department, Sharon Morgan, who checked the Dale County computer database and told Pope that there was an outstanding warrant for petitioner in Dale County for failure to appear on a felony charge. Pope asked Morgan to immediately retrieve and to fax a hard copy of the warrant to Coffee County. She then informed Anderson that Dale County reported a warrant for petitioner's arrest. Anderson promptly left the sheriff's office with Deputy Sheriff Neil Bradley to pursue petitioner.

Meanwhile, Dale County warrant clerk Morgan was searching for the purported warrant so she could fax a copy to Coffee County. But Morgan could find no warrant concerning petitioner in the Dale County Sheriff's Department's paper files. Morgan then called the Dale County Clerk's Office, which advised her that there was not, in fact, any outstanding warrant for petitioner's arrest; the court had recalled the warrant referenced in Morgan's computer database five months earlier, on Feb. 2, 2004. Apparently, when the Clerk's Office had notified the Dale County Sheriff's Department of the recall, the Sheriff's Department had returned its copy of the warrant but had neglected to

update its computer database to reflect that the warrant had been recalled. App. 3a, 15a.[1]

About ten to fifteen minutes had now passed since Morgan's original conversation with Pope, and Morgan called her back to inform her that Dale County did not actually have any warrant for petitioner's arrest. Pope then radioed Morgan's retraction to Anderson and Deputy Bradley.

It was too late. Anderson and Bradley already had stopped petitioner's vehicle. They had told him that they intended to arrest him on the basis of a warrant from Dale County. Petitioner had informed the officers that he did not have an outstanding warrant from Dale County and had demanded to see a copy of the alleged warrant before any arrest took place. But without waiting the few minutes necessary to receive further information concerning the validity of the warrant, the officers had gone ahead and conducted a full-scale arrest of petitioner. After they had handcuffed petitioner, the officers had searched him and his truck and found methamphetamine in his pockets and an unloaded gun under the front seat of his vehicle. App. 3a. When Anderson and Bradley received Pope's call, both petitioner and the evidence of criminal activity the officers had discovered in the

---

[1] Morgan testified that "[e]veryone has access to our in-office database, and whoever, and I do not know who it was, returned the warrant to the Clerk's Office did not enter into my database that the warrant had been recalled." Supplemental Hearing on Motion to Suppress Proceeding 13:6-10. Morgan believed that the error was committed by someone within the Dale County Sheriff's Department. *Id.*

search incident to arrest were under the officers' custody and control.

2. The federal government indicted petitioner in the U.S. District Court for the Middle District of Alabama on charges of possessing methamphetamine and being a felon in possession of a firearm, in violation of 21 U.S.C. § 844(a) and 18 U.S.C. § 922(g)(1). Shortly thereafter, petitioner moved to suppress all evidence of the methamphetamine and firearm as improper fruits of his unlawful arrest. The district court accepted that the arrest violated the Fourth Amendment; there was no warrant or any other kind of probable cause to arrest petitioner. *See, e.g., Whiteley v. Warden,* 401 U.S. 560, 568 (1971). Because the Dale County Sheriff's Department's negligent recordkeeping had set in motion the events leading to petitioner's illegal arrest and accompanying illegal search, the court framed the sole question as whether "the good-faith exception to the exclusionary rule, as articulated in [*Arizona v.*] *Evans*, should be extended to mistakes by police personnel." App. 16a.

The district court denied the motion, agreeing with the magistrate judge that there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes." App. 4a. A jury subsequently found petitioner guilty of both counts. The district court sentenced petitioner to twenty-seven months imprisonment.

3. The Eleventh Circuit affirmed the district court's denial of petitioner's suppression motion, as well as petitioner's conviction and sentence. The Eleventh Circuit began its analysis of petitioner's

Fourth Amendment claim – the sole issue on appeal – by noting that "[t]he parties agree on the central facts," including the fact that petitioner's arrest resulted from an error by law enforcement personnel. App. 4a; *see also* Gvt. CA11 Br. at 5-6; Supplemental Hearing on Motion to Suppress Proceeding 13:6-14. Accordingly, the Court of Appeals acknowledged, echoing the district court, that this case presents the question that this Court expressly reserved in *Evans*. App. 7a, 16a.

For guidance on this issue, the Eleventh Circuit turned to this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which it interpreted to require that three conditions be satisfied in order to apply the exclusionary rule to the fruits of an unlawful search and seizure. App. 9a. First, "there must be misconduct by the police or by adjuncts to the law enforcement team." *Id.* Second, application of the exclusionary rule must cause "appreciable deterrence" of such misconduct. *Id.* And third, "the benefits of the rule's application must not [sic] outweigh its costs." *Id.*

Although the Eleventh Circuit acknowledged that the first condition of its test was satisfied here, it held that the second condition was not satisfied because applying the exclusionary rule "will not deter bad record keeping to any appreciable extent, if at all." App. 9a-10a. The court advanced three rationales – two of which it devised *sua sponte* – in support of this hypothesis. First, the court asserted that excluding evidence in a case like this would not deter negligent recordkeeping because "the conduct in question is a negligent failure to act" and "[d]eterrents work best

where the targeted conduct results from conscious decision making." App. 10a. Second, the Eleventh Circuit asserted that the police "already [have] abundant incentives for keeping records current." *Id.* Third, the Court of Appeals asserted that when a law enforcement agency other than the arresting agency acts negligently in providing information leading to an arrest, it is unlikely that the exclusionary rule would deter sloppy recordkeeping because the cost would not fall on the responsible party. App. 11a. Based on these rationales, the Eleventh Circuit concluded that any "minimal deterrence" the exclusionary rule might achieve against the type of law enforcement error in this case would not outweigh the cost of exclusion. App. 11a-12a.

REASONS FOR GRANTING THE WRIT

This Court held in *Arizona v. Evans*, 514 U.S. 1 (1995), that evidence obtained in an illegal search incident to arrest need not be suppressed when the arresting officer conducted the search in good faith reliance upon a clerical error by a court employee. Since that decision was announced, federal courts of appeals and state courts of last resort have divided five-to-four over the question that *Evans* expressly reserved (*id.* at 16 n.5): whether the exclusionary rule applies when similar errors by *law enforcement agents* cause illegal arrests and searches.

This Court should resolve this conflict of authority. The question of how to apply the Fourth Amendment's exclusionary rule in cases involving law enforcement's clerical negligence is a recurring and important one in the criminal justice system. It is

outcome-determinative in this case. And the Eleventh Circuit's refusal to apply the exclusionary rule here contravenes this Court's precedent. For over ninety years, this Court has enforced the exclusionary rule every time the government in a federal prosecution has sought to rely on evidence that it obtained as a direct result of illegal law enforcement conduct. Nothing in *Evans* undercuts this unbroken line of authority. To the contrary, *Evans* emphasized at every turn that court employees, unlike "adjuncts of the law enforcement team engaged in the often competitive enterprise of ferreting out crime, . . . have no stake in the outcome of particular criminal prosecutions." *Id.* at 15 (internal citation omitted). It thus remains appropriate and necessary to enforce the exclusionary remedy when employees of any law enforcement agency working in collaboration with arresting officers negligently make clerical errors that trigger groundless arrests and searches that arresting officers would not otherwise have undertaken – especially when, as here, there is no other remedy or deterrent measure that is available.

I. State And Federal Courts Are Deeply Divided Over Whether The Exception To The Exclusionary Rule Adopted In *Arizona v. Evans* Applies When Law Enforcement Personnel, Instead Of Court Clerks, Negligently Trigger An Illegal Search And Seizure.

Twelve years ago, in *Arizona v. Evans*, 514 U.S. 1 (1995), this Court confronted a situation in which a police officer arrested a motorist based on a computer records check that showed there was a warrant for his arrest. In a search the officer conducted incident to

that arrest, he discovered illegal drugs. But when the police later notified the local court of the arrest, the court advised the police that the warrant for the motorist had been quashed seventeen days earlier. A court employee had failed to notify the police department when this happened.

Although Evans' arrest and the officer's subsequent search were illegal, this Court held that when an illegal search and seizure occurs as a result of a clerical error by a "court employee[]," the Fourth Amendment does not require evidence obtained in the search to be suppressed in a subsequent criminal prosecution. *Id.* at 16. In so holding, this Court emphasized that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees." *Id.* at 14. And in *Evans*, no law enforcement employee had done anything wrong. "[M]ost important," this Court continued:

> [T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.

Id. at 15 (internal citations omitted).

Lest there be any misunderstanding of this Court's focus on the duties and incentives of court employees, as opposed to those of law enforcement agents, this Court expressly reserved the question whether the exclusionary rule applies to recordkeeping errors by law enforcement personnel. *Id.* at 16 n.5. Concurring opinions likewise emphasized that "the Court limit[ed] itself to the question whether a *court employee's* departure from established procedures is the kind of error to which the exclusionary rule should apply." *Id.* at 17 (O'Connor, J., concurring) (emphasis added); *id.* at 18 (Souter, J., concurring) ("In joining the Court's opinion, I share Justice O'Connor's understanding of the narrow scope of what we hold today.").

Over the twelve years since *Evans* reserved the question whether its exception to the exclusionary rule would also apply to negligent errors by law enforcement personnel, the federal courts of appeals and state supreme courts have become deeply divided over the issue.

1. In this case, the Eleventh Circuit held that *Evans* extends to errors committed by law enforcement. After quickly acknowledging that the exclusionary rule is traditionally aimed at law enforcement illegalities, the Eleventh Circuit focused on the nature of the illegality at issue, reasoning that the exclusionary rule is unlikely to deter negligent clerical errors because "the conduct in question is a negligent failure to act, not a deliberate or tactical choice to act." App. 10a. The Eleventh Circuit also asserted that it is

unnecessary to apply the exclusionary rule here because law enforcement departments already have "abundant incentives" to keep accurate records – namely, "the inherent value of accurate record-keeping to effective police investigation"; the possibility of internal reprimand or civil liability; and "the risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result." App. 10a-11a. So long as arresting officers are unaware at the time of arrest that the information that other law enforcement agents have negligently provided is incorrect, the exclusionary rule, in the Eleventh Circuit's view, does not apply.

Two other federal courts of appeals (both of which the district court referenced below, *see* App. 16a), and one state supreme court likewise refuse to suppress evidence police obtain as a result of fellow law enforcement agents' clerical negligence. The two federal courts of appeals, like the Eleventh Circuit, interpret *Evans* as exempting all clerical errors from the exclusionary rule. So long as an arresting officer acts in good faith, the source of the clerical error that allowed the arrest is irrelevant. *United States v. Castaneda*, 2001 WL 1085086, at *1 (5th Cir. 2001) (Police arrested defendant on invalid warrant: "While the Supreme Court has remained silent on this issue, we have held that the good-faith exception to the exclusionary rule applies regardless of whether the error was by court clerks or police personnel") (following as binding precedent *United States v. De Leon-Reyna*, 930 F.2d 396, 400-01 (5th Cir. 1991) (en banc)); *United States v. Williams*, 1998 WL 276460, at *2-3 (4th Cir. 1998) (Sheriff's office failed to inform law

enforcement in another county that warrant had been served and thus should have been removed from the county's computer database: Although *Evans* reserved the question whether it extended to law enforcement errors, "we are satisfied that the error in this case is of the type that is clearly contemplated by the good faith exception as explained by both *Leon* and *Evans*.").[2]

The Georgia Supreme Court has reached the same result on different grounds, going so far as to hold that an arresting officer's reasonable belief that a valid warrant exists for a suspect's arrest provides probable cause for an arrest, and thus that the Fourth Amendment is not even violated when the ostensible warrant has in fact been recalled. *Harvey v. State*, 469 S.E.2d 176, 178-79 (Ga. 1996). Accordingly, evidence obtained under such circumstances cannot be suppressed in Georgia courts. *Id.* at 179.

2. In direct contrast to the Eleventh Circuit's holding and the others like it, five state supreme courts have concluded that the *Evans* exception to the exclusionary rule turns not on the type of error at

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[2] Two other federal courts of appeals have stated that the exclusionary rule does not apply to law enforcement agents' clerical errors without explicitly so holding. *See United States v. Southerland*, 486 F.3d 1355, 1361 (D.C. Cir.) (finding that DMV employee's error in informing police department that driver's license was suspended did not trigger exclusionary rule because even if DMV employees in that jurisdiction were considered fellow police officers, the reasonableness of the arresting officers' actions "precludes, under *Leon* and *Evans*, application of the exclusionary rule."), *cert. denied*, 128 S. Ct. ____ (Oct. 9, 2007); *United States v. Sparks*, 37 Fed. Appx. 826, 829 (8th Cir. 2002) (stating that the good faith exception to exclusionary rule would apply if an officer stopped a motorist in reliance on a police dispatcher's mistake).

issue but rather on the source of the error. Specifically, these courts hold that evidence that police officers seize in reliance on clerical errors must be suppressed when those errors are committed not by court employees but by officers in other police departments or other "adjuncts to the law enforcement team." *Evans*, 514 U.S. at 15.

In *Shadler v. State*, 761 So. 2d 279 (Fla.), *cert. denied*, 531 U.S. 924 (2000), a computer database maintained by the Department of Highway Safety erroneously indicated that the defendant's license had been suspended. Relying on that incorrect computer record, a police officer arrested the defendant for driving with a suspended license, and subsequently found narcotics in a search incident to that arrest. The Florida Supreme Court – in a decision that the government implicitly acknowledged below could not be distinguished from the result it was seeking in the Eleventh Circuit, *see* Gvt. CA11 Br. at 15, n.2[3] – held that the Fourth Amendment required the narcotics to be suppressed. The Florida Supreme Court reasoned that "unlike the court personnel in *Evans*," employees of the Department of Highway Safety are at least "adjuncts to the law enforcement team." 761 So. 2d at 285 (quoting *Evans*, 514 U.S. at 15). "Accordingly," the court continued, "the operation of the exclusionary rule in this context does not, as the State would suggest, serve to 'punish' police for their 'reasonable

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[3] Petitioner argued in his brief to the Eleventh Circuit that *Shadler* was on point and supported reversal. The government's sole response to this argument was an assertion that *Shadler* was "plainly inconsistent with *Evan* [sic]," and that the Eleventh Circuit should follow the dissent instead of the majority in *Shadler*. Gvt. CA11 Br. at 15, n.2.

reliance' upon the mistake of some wholly separate and independent agency completely unconnected to law enforcement." *Id.* To the contrary, enforcing the exclusionary rule "is perhaps the only means by which the judiciary can help to ensure the accuracy of records and information compiled by the Department of Highway Safety and its divisions that routinely provide records to Florida's police and sheriffs' departments." *Id.*; *see also State v. White*, 660 So. 2d 664 (Fla. 1995) (excluding evidence where police database indicated that warrant that had already been served was still outstanding).

In a case with factual details even more closely parallel to those here, the Arkansas Supreme Court also has ruled that the *Evans* exception does not extend to clerical errors committed by law enforcement agents. In *Hoay v. State*, 71 S.W.3d 573 (Ark. 2002), a police officer from one sheriff's department arrested the defendant upon learning that a computer database in a different county's sheriff's department indicated (erroneously, it turned out) that there was an outstanding warrant for the defendant's arrest. *Id.* at 574. Interpreting *Evans* as being applicable only to "errors committed by court personnel," the Arkansas Supreme Court held that "[i]f the touchstone of the exclusionary rule is deterrence of police misconduct, as *Leon* makes clear, that rule should apply equally to defective recordkeeping by law enforcement." *Id.* at 576-77. "[R]efus[ing] to suppress [evidence] based on objective good faith" of the arresting police department would "fly in the face" of the need to deter "defective recordkeeping" by law enforcement as a whole. *Id.* at 577.

Other state supreme courts have reached the same conclusion in cases involving detentions and searches pursuant to similar types of clerical errors by law enforcement agents. In *People v. Willis*, 46 P.3d 898 (Cal. 2002), the California Supreme Court explained that *Evans* requires courts to "distinguish between errors of law enforcement and those of judges, court employees, and legislators" and held that the Fourth Amendment required the evidence at issue to be suppressed, even though arresting officers acted in good faith, because the recordkeeping error that triggered the detention and search was committed by "adjuncts to the law enforcement team" in a different agency. *Id.* at 912-17. In *State v. Allen*, 690 N.W.2d 582 (Neb. 2005), a case concerning a mistaken communication between a dispatcher and an arresting officer, who acted in good faith, the Nebraska Supreme Court held that the Fourth Amendment required suppression of evidence obtained pursuant to the arrest because "the threat of exclusion is likely to cause police officers and dispatchers to exercise greater care than was exercised in this case when obtaining and transmitting vehicle registration information . . . ." *Id.* at 593; *see also State v. Hisey*, 723 N.W.2d 99 (Neb. Ct. App. 2006) (excluding evidence where an adjunct to the law enforcement team erroneously informed police that a motorist's driver's license was suspended). Finally, in a pre-*Evans* case in which a parole officer had inaccurately entered into a computer database that a warrant had been issued for a parolee (in fact, the warrant had been requested but never actually issued), the Colorado Supreme Court held that the exclusionary rule operated to suppress evidence resulting from the

invalid arrest. *People v. Fields*, 785 P.2d 611 (Colo. 1990). The Colorado Supreme Court reaffirmed this holding after *Evans*, explaining that "[t]he categorical exclusion for clerical errors of court employees announced in *Evans* does not include the type of unexplained police error present in *Fields*. Thus, *Evans* has no effect upon our decision in *Fields*." *People v. Blehm*, 983 P.2d 779, 796 (Colo. 1999).[4]

Finally, three more state courts of last resort have held that the exclusionary rule applies when law enforcement personnel commit clerical errors leading to illegal arrests, although, unlike the Colorado Supreme Court, none of these courts has revisited the issue in a post-*Evans* case. *See People v. Turnage*, 642 N.E.2d 1235, 1241 (Ill. 1994) (affirming exclusion of evidence after arrest on duplicative warrant);[5] *Ott v. State*, 600 A.2d 111, 117, 119 (Md. 1992) (upholding exclusion of evidence where sheriff's department failed

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[4] Two federal courts of appeals likewise have indicated, in cases involving different kinds of errors than this one, that the Fourth Amendment requires excluding evidence resulting from law enforcement agents' clerical errors. *United States v. Santa*, 180 F.3d 20, 29 (2d Cir. 1999) ("*Evans*'s categorical exception to the exclusionary rule applies *only* when police rely on erroneous computer records resulting from clerical errors of court employees.") (internal quotation marks omitted) (emphasis added); *United States v. Shareef*, 100 F.3d 1491, 1503 (10th Cir. 1996) ("We agree with the district court that the exclusionary rule applies when an error by a dispatcher or an officer leads to a Fourth Amendment violation.").

[5] The Illinois Court of Appeals has held in a post-*Evans* case that the exclusionary rule continues to apply to errors by law enforcement personnel. *People v. Anderson*, 711 N.E.2d 24, 31-32 (Ill. App. Ct.) (excluding evidence where arrest was based on outdated warrant list), *appeal denied*, 720 N.E.2d 1095 (Ill. 1999).

to remove from a database a warrant that had already been served); *People v. Jennings*, 430 N.E.2d 1282, 1285 (N.Y. 1981) (holding that evidence should be suppressed because the police arrested the defendant based on vacated warrant that remained in another law enforcement agency's database).

3. Because this conflict over the admissibility of illegally seized evidence is deeply entrenched and turns on how to interpret the Fourth Amendment and this Court's precedent, this Court is the only institution that can resolve the dispute. The need to do so is particularly pressing here because a state court of last resort within the Eleventh Circuit, the Florida Supreme Court, has reached a decision directly opposed to the Eleventh Circuit's. Accordingly, the decision below creates the "troubling" possibility, in the context of arrests based on invalid warrants, of a "state-initiated prosecution [being] brought in a federal court because it could not lawfully be brought in a state court." *United States v. Santa*, 180 F.3d 20, 30 (2d Cir. 1999) (Newman, J., concurring); *see also Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961) (expressing similar concern over such "double standard[s]"); *Elkins v. United States*, 364 U.S. 206, 221-23 (1960) (same). Such an incentive for evading state efforts to deter Fourth Amendment violations will remain until this Court intervenes.

II. The Question Presented Arises Frequently And Is Extremely Important.

In *Evans*, Justice O'Connor (joined by Justices Souter and Breyer) emphasized the need for this Court to delineate the scope of the exclusionary rule in the

context of clerical negligence leading to illegal arrests and searches:

> In recent years, we have witnessed the advent of powerful, computer-based record-keeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.

514 U.S. at 17-18 (O'Connor, J., concurring). These constitutional responsibilities are only as meaningful as they are clearly elucidated and consistently enforced. Yet although courts regularly encounter cases arising from law enforcement agents' clerical errors, they are sending conflicting signals respecting the repercussions (if any) of such negligence.

Indeed, as policing becomes ever more reliant on computerized systems, the number of illegal arrests and searches based on negligent recordkeeping is poised to multiply. In addition to the now well-established police practice of asking other law enforcement agents to search computerized databases for outstanding warrants, police departments across the country are now deploying automatic license plate recognition systems. These systems automatically alert officers whenever a police cruiser passes a car that is registered to someone who, according to a computerized database, has an outstanding warrant, a

suspended license, or the like. Jaques Billeaud, *Infrared Cameras Help Police Scan for Trouble*, L.A. TIMES, Sept. 9, 2007, at B7. As police officers arrest more motorists based solely upon computerized databases' indications of outstanding arrest warrants and other improprieties, officers are bound to conduct more unlawful searches based on erroneous information in such databases. Prosecutors, defense lawyers, and courts need to know whether this illegally obtained evidence can be used to initiate criminal prosecutions.

III. This Case Is An Ideal Vehicle For This Court To Resolve The Question Presented.

This case presents a perfect opportunity for this Court to decide whether the exclusionary rule applies to evidence seized in a groundless and unconstitutional search caused by a law enforcement agent's clerical negligence. The arrest and search here derived from precisely the same sort of error addressed in *Evans* – an arrest and concomitant search based on an erroneous computer record of a warrant that was no longer valid – with the crucial distinction that here a law enforcement agent erred, not court personnel.

This case does not involve any complications that could prevent this Court from reaching the central issue. The government has never asserted any reason but reliance on the no-longer-valid warrant for the arrest or search. Nor are there any disputed issues of fact regarding the arrest or search that could impede this Court in resolving whether the exclusionary rule applies under these circumstances. As the Eleventh Circuit observed, "The parties agree on the central

facts. . . . The erroneous information about the warrant resulted from the negligence of someone in the Dale County Sheriff's Department . . . . The only dispute is whether, under these facts, the exclusionary rule requires the suppression of the firearm and drugs." App. 4a.

IV. The Eleventh Circuit's Decision Contravenes This Court's Precedent.

The sweep of this Court's Fourth Amendment jurisprudence, reinforced by the reasoning in *Evans*, dictates that evidence illegally seized as a result of law enforcement's negligent recordkeeping may not be introduced in criminal prosecutions.

1. Exclusion of illegally seized evidence is the traditional remedy when the federal government seeks to introduce evidence that law enforcement obtained as a result of its violating a defendant's Fourth Amendment rights. Nearly a century ago, this Court unanimously adopted the exclusionary rule for federal prosecutions. *Weeks v. United States*, 232 U.S. 383, 398 (1914). This Court explained that if something that police seize without any legitimate justification can be introduced against a citizen in a criminal prosecution, then:

> the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the

> sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393. Several years later, this Court again confronted a case in which the government, "while in form repudiating and condemning the illegal seizure, [sought] to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Silverthorne Lumber Co., Inc., v. United States*, 251 U.S. 385, 391 (1920). Writing for the Court, Justice Holmes reaffirmed that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that [] evidence so acquired . . . shall not be used at all" in a criminal prosecution. *Id.* at 392; *see also Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (exclusionary rule is necessary to prevent Fourth Amendment from being "an empty promise").

This Court has never wavered from the judgment that imposing the exclusionary rule in criminal trials is necessary when law enforcement's mistakes or malfeasance allow it illegally to obtain evidence that it otherwise would not have acquired. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (per curiam); *Minnesota v. Olson*, 495 U.S. 91, 95 (1990); *Franks v. Delaware*, 438 U.S. 154, 156 (1978); *Michigan v. Tyler*, 436 U.S. 499, 511 (1978). To be sure, this Court has created a "good faith" exception to the exclusionary rule for instances in which illegal searches are solely attributable to reasonable reliance on judicial or legislative officers. *See Arizona v. Evans*, 514 U.S. 1 (1995) (court clerk's error); *Illinois v. Krull*, 480 U.S.

340 (1987) (legislative error); *United States v. Leon*, 468 U.S. 897 (1984) (magistrate error); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (legislative error). In such cases, "there is no *police* illegality" or reason for the *police* to suspect illegality "and thus nothing to deter." *Leon*, 468 U.S. at 920 (emphasis added); *accord Krull*, 480 U.S. at 349-50. But when arresting officers themselves or law enforcement agents with whom they work in concert engage in improper conduct that allows them to find evidence they could not constitutionally have obtained, the exclusionary rule is necessary to deter such errors in the future. *Leon*, 468 U.S. at 923 n.24; *see also Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006) (reaffirming that exclusionary rule is appropriate when police conduct search without a "valid warrant"); *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring in the judgment) ("[T]he exclusionary rule [provides] an incentive for the law enforcement profession *as a whole* to conduct themselves in accord with the Fourth Amendment.") (emphasis added).

Such is the case here. In contrast to *Evans*, in which a court clerk's recordkeeping error led to an illegal search, the error here was committed by an "adjunct[] to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" who, therefore, had a "stake in the outcome of particular criminal prosecutions" such as petitioner's. *Evans*, 514 U.S. at 15. This kind of Fourth Amendment violation, which allows police officers illegally to obtain evidence they would not otherwise have acquired, is exactly the kind of misconduct that *Evans* made clear "the exclusionary rule was historically designed as a means of deterring." *Id.* at 14.

2. The Eleventh Circuit nevertheless declined to suppress the illegally obtained evidence here, proffering three reasons – the first two of which were not even advanced by the government – why it believed that the exclusionary rule would not appreciably deter law enforcement clerical errors. None of these rationales for extending *Evans'* exception to the exclusionary rule into the realm of law enforcement errors withstands analysis.

a. First, the Eleventh Circuit noted that "the conduct in question is a negligent failure to act, not a deliberate or tactical choice to act" and asserted that "only if the decision maker considers the possible results of her actions can she be deterred." App. 10a. But contrary to the Eleventh Circuit's supposition that negligence cannot be meaningfully deterred, this Court has made it clear that the exclusionary remedy can and does deter negligent conduct. "By refusing to admit evidence gained as a result of [police negligence], the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Michigan v. Tucker,* 417 U.S. 433, 447 (1974). Indeed, elementary tort law dictates that negligence can involve either acts or omissions, and that properly crafted legal rules will deter individuals from negligent failures to act. *See* RESTATEMENT (SECOND) OF TORTS §§ 282, 284 (1965) (defining negligence to include omissions). Commentators thus recognize that "[t]he task of the tort law, under an efficiency standard, is to find ways to induce [a person] to take [a certain] level of precaution . . . when the potential harms would be inflicted not on himself, but on

[someone] who . . . is unable to take precautions to protect herself." RICHARD EPSTEIN, TORTS 94 (1999).

That function is exactly what courts besides the Eleventh Circuit have confirmed the exclusionary rule serves in the context of law enforcement clerical errors. *See People v. Willis,* 46 P.3d 898, 912 (Cal. 2002) (applying exclusionary rule when "most important consideration" is whether "exclusion under these circumstances will have a significant effect on [law enforcement] clerks"); *Shadler v. State,* 761 So. 2d 279, 285 (Fla. 1999) (applying exclusionary rule to law enforcement's clerical errors is appropriate when it increases the chance that a "mistake" in recordkeeping "will not simply be overlooked"). Faced with the possibility of exclusion, police departments can reasonably be expected to step up their efforts to keep computer records up-to-date and accurate.

b. Second, the Eleventh Circuit suggested, without citing any authority or evidence, that law enforcement agencies "already [have] abundant incentives for keeping records current." App. 10a. None of the rationales that the Eleventh Circuit advanced in support of this assertion withstands scrutiny:

• *"First, there is the inherent value of accurate record-keeping to effective police investigation. Inaccurate and outdated information in police files is just as likely, if not more likely, to hinder police investigations as it is to aid them."* App. 10a. Police incentives are not so simple and uniform. While law enforcement departments certainly have an interest in keeping computer databases current with respect to newly issued active warrants, they have no compar-

able interest in expunging recalled or otherwise invalid warrants from such databases. As this case illustrates, police officers check computer databases only when they want to investigate an individual whom they suspect of wrongdoing. Under these circumstances, relaying erroneous information to officers that induces the officers reasonably to believe that they may detain and search such individuals can only aid police investigations by enlarging the officers' perceived authority to act. In fact, if relying on erroneous information that another law enforcement agent entered into a computer database insulates the fruits of illegal searches from the exclusionary rule (or even, as the Georgia Supreme Court has held, renders the searches perfectly constitutional, *see Harvey v. State,* 469 S.E.2d 176, 179 (Ga. 1996)), then law enforcement agents arguably have an incentive to *refrain* from expunging recalled or invalid warrants from their databases.

• *"Second, . . . there is the possibility of reprimand or other job discipline for carelessness in record keeping."* App 10a. There is no evidence that a reprimand or other disciplinary action occurred, or was even contemplated, in this case. Nor is there any reason to believe that any other law enforcement agent has ever been disciplined for similar negligence. Even if such evidence existed, the Eleventh Circuit's argument would prove far too much: reprimand or other discipline could also act as a deterrent in every one of the other situations in which the exclusionary rule historically applies. Indeed, discipline is most likely in those cases in which the exclusionary rule is most certain to be applied – purposeful violations of defendants' constitutional rights. Yet this Court has

continued to back the use of the exclusionary rule as an appropriate and necessary means of deterring Fourth Amendment violations. *See supra* at 21 (collecting cases).

• *"Third, there is the possibility of civil liability if the failure to keep records updated results in illegal arrests or other injury."* App. 10a. The Eleventh Circuit cited no authority for this proposition, and none exists. Plaintiffs cannot obtain civil damages under 42 U.S.C. § 1983 from police departments based on a theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). And this Court has indicated that when, as here, arresting officers rely in good faith on another police department's erroneous representation that an individual may be detained, the officers themselves have "a good-faith defense to any civil suit." *United States v. Hensley*, 469 U.S. 221, 232-33 (1985); *see also Baker v. McCollan*, 443 U.S. 137, 143-45 (1979). The victim of an illegal arrest cannot obtain relief against the law enforcement agent who made the clerical error either. Even when the culpable agent can be pinpointed, negligent recordkeeping does not itself violate the Fourth Amendment and thus cannot give rise to a lawsuit under 42 U.S.C. § 1983. *See, e.g., Berg v. County of Allegheny*, 219 F.3d 261, 274 (3d Cir. 2000) (affirming dismissal of a civil rights action against a county warrant clerk who erroneously entered information leading to the plaintiff's illegal arrest), *cert. denied*, 531 U.S. 1072 (2001). Nor can a victim obtain state-law relief for negligent conduct leading to an improper arrest. Plaintiffs bringing false arrest claims under Alabama law, as in other states, must demonstrate that law enforcement agents acted with bad faith or

willful or malicious intent – a burden that, by definition, is impossible to meet in a negligent recordkeeping case. *See* ALA. CODE § 6-5-338(a); *Borders v. City of Huntsville*, 875 So. 2d 1168, 1178 (Ala. 2003).

• *"Fourth, there is the risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result."* App. 10a-11a. The reasoning of the Eleventh Circuit's own holding precludes such exclusion. According to the Eleventh Circuit, so long as arresting officers rely in good faith on a computer record showing the existence of an outstanding warrant that another law enforcement agent negligently failed to delete, evidence the arresting officers uncover in a search incident to arrest is admissible at trial.

c. Finally, the Eleventh Circuit emphasized that the police department that made the recordkeeping error in this case was not the department that brought criminal charges against petitioner, and the court asserted that punishing one department for another department's negligent error would not deter future negligence. App. 11a. The Eleventh Circuit claimed that attempting to deter negligence under these circumstances "would be like telling a student that if he skips school one of his classmates will be punished." App. 11a.

Contrary to the Eleventh Circuit's assertion, exclusion is no less appropriate when the "sanction would be levied . . . [in] a case brought by officers of a different department." App. 11a. Even putting aside the reality that police officers do not bring criminal prosecutions (prosecutors do), this Court's cases

dictate that police officers working in concert in order to investigate crime are not the same as elementary school students who might skip school. The very essence of law enforcement is a collaborative effort aimed at a common crime-fighting goal; instead of presenting a "unique" circumstance, App. 11a, it is standard practice for police investigators to rely on information transmitted by different agencies. Accordingly, this Court has held that any single officer's or department's knowledge of facts that justify detaining a suspect is automatically imputed to all other law enforcement personnel working on the same investigation. *See, e.g.*, *Hensley*, 469 U.S. at 232-33.

As the California Supreme Court has recognized, "if we impute to the arresting officer the collective knowledge of law enforcement agencies for the purpose of establishing probable cause, we must also charge him with the knowledge of information exonerating a suspect formerly wanted in connection with a crime." *Willis*, 46 P.3d at 915 (quoting *People v. Ramirez*, 668 P.2d 761, 764 (Cal. 1983)). This Court indicated as much in *Leon*, citing with approval its prior holding in *Whiteley v. Warden*, 401 U.S. 560 (1971), which required the suppression of evidence obtained in an unjustified search incident to arrest because "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.* at 568, *cited in Leon*, 468 U.S. at 923 n.24. This result also comports with Fifth Amendment jurisprudence, which follows the collective knowledge concept when enforcing *Miranda*'s exclusionary rule with respect to confessions. *See Arizona v. Roberson*, 486 U.S. 675, 687-88 (1988); *Alston v. Redman*, 34 F.3d 1237, 1243

(3d Cir. 1994) ("[O]fficers who interrogate a suspect after the suspect has invoked his right to counsel are charged with the knowledge of the prior invocation."); *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir. 1983) (knowledge of a suspect's request for counsel "is imputed to all law enforcement officers who subsequently deal with the suspect").

In addition to ignoring the collective nature of the law enforcement enterprise, the Eleventh Circuit's reasoning misapprehends how the exclusionary rule's deterrent incentives operate. If courts exclude illegally seized evidence in interdepartmental cases such as this, police departments will have an incentive to maintain computer databases more carefully – not only because of the effect that such a rule would have on arrests and stops by other departments, but also because of the effect it would have on their own cases. The warrant information in Dale County's database was not maintained solely for the benefit of Coffee County; Dale County officers could just as easily have relied on the database to arrest petitioner. The prospect of having evidence excluded in a case initiated by Dale County investigators is a significant part of the deterrence calculus.

* * *

There can be little doubt that the benefits of enforcing the exclusionary rule outweigh the costs in cases in which law enforcement's negligence has triggered searches and seizures that would not otherwise have taken place. On the one hand, police departments will be deterred from maintaining sloppy records that allow them to arrest and search people

without just cause. Officers also will be encouraged, when feasible, to verify the accuracy of computerized records. Here, for example, if the arresting officers had simply waited the few minutes necessary for the Dale County Sheriff's Department clerk to complete her search for the supposed warrant, they would have learned that they had no legal authority to arrest petitioner. *See Adams v. Williams,* 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."). Even if computer databases do not "routine[ly]" provide incorrect information, App. 12a, it is common knowledge that they are sometimes wrong and it is thus unreasonable to "blindly" rely on them when speedy confirmation is possible. *See Evans,* 514 U.S. at 17 (O'Connor, J., concurring).

On the other hand, even in cases such as this, in which such illegal searches and seizures reveal evidence indicating criminality, excluding that evidence in a subsequent prosecution simply returns the government to the same position it occupied before its negligent and illegal conduct. And, as in other classic instances in which this Court has refused to allow the government to base a criminal prosecution upon evidence it obtained as a direct result of an illegal search, enforcing the exclusionary rule here does nothing more than apply "[t]he essence of a provision forbidding [law enforcement's unreasonable] acquisition of evidence." *Silverthorne Lumber,* 251 U.S. at 392.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[PUBLISH]

UNITED STATES COURT OF APPEALS,

ELEVENTH CIRCUIT

No. 06-10795

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

BENNIE DEAN HERRING, Defendant-Appellant

July 17, 2007

Appeal from the United States District Court for the Middle District of Alabama

Before CARNES, PRYOR and FARRIS,* Circuit Judges.

CARNES, Circuit Judge:

The facts of this case present an interesting issue involving whether to apply the exclusionary rule. Officers in one jurisdiction check with employees of a law enforcement agency in another jurisdiction and are told that there is an outstanding warrant for an individual. Acting in good faith on that information the officers arrest the person and find contraband. It turns out the warrant had been recalled. The erroneous information that led to the

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

arrest and search is the result of a good faith mistake by an employee of the agency in the other jurisdiction. Does the exclusionary rule require that evidence of the contraband be suppressed, or does the good faith exception to the rule permit use of the evidence?

On a July afternoon in 2004, Bennie Dean Herring drove his pickup truck to the Coffee County, Alabama Sheriff's Department to check on another of his trucks, which was impounded in the Department's lot. As Herring was preparing to leave the Sheriff's Department, Coffee County Investigator Mark Anderson arrived at work. Anderson knew Herring and had reason to suspect that there might be an outstanding warrant for his arrest. Anderson asked Sandy Pope, the warrant clerk for the Coffee County Sheriff's Department, to check the county database. She did and told Anderson that she saw no active warrants for Herring in Coffee County.

Investigator Anderson asked Pope to call the Sheriff's Department in neighboring Dale County to see if there were any outstanding warrants for Herring there. Pope telephoned Sharon Morgan, the Dale County warrant clerk, who checked her database and told Pope that there was an active warrant in that county charging Herring with failure to appear on a felony charge. Pope relayed that information to Anderson.

Acting quickly on the information, Investigator Anderson and a Coffee County deputy sheriff followed Herring as he drove away from the Sheriff's Department. They pulled Herring over and arrested him pursuant to the Dale County warrant, and they

searched both his person and the truck incident to the arrest. The search turned up some methamphetamine in Herring's pocket and a pistol under the front seat of his truck. All of that happened in Coffee County.

Meanwhile back in Dale County, Warrant Clerk Morgan was trying in vain to locate a copy of the actual warrant for Herring's arrest. After she could not find one, she checked with the Dale County Clerk's Office, which informed her that the warrant had been recalled. Morgan immediately called Pope, her counterpart in Coffee County, to relay this information, and Pope transmitted it to the two Coffee County arresting officers. Only ten to fifteen minutes had elapsed between the time that Morgan in Dale County had told Pope that an active warrant existed and the time that Morgan called her back to correct that statement. In that short interval, however, the Coffee County officers had acted on the initial information by arresting Herring and carrying out the searches incident to that arrest.

As a result of the contraband found during the searches, Herring was indicted on charges of possessing methamphetamine in violation of 21 U.S.C. § 844(a), and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He moved to suppress any evidence of the methamphetamine and firearm on grounds that the searches that turned them up were not incident to a lawful arrest, because the arrest warrant on which the officers acted had been rescinded.

The magistrate judge recommended denying the motion to suppress. He found that the arresting

officers conducted their search in a good faith belief that the arrest warrant was still outstanding, and that they had found the drugs and firearm before learning the warrant had been recalled. The magistrate judge concluded that there was "simply no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes." The district court adopted the magistrate judge's recommendation and made the additional finding that the erroneous warrant information appeared to be the fault of Dale County Sheriff's Department personnel instead of anyone in Coffee County.

A jury convicted Herring of both counts, and he was sentenced to 27 months imprisonment. His sole contention on appeal is that the district court erred in denying his motion to suppress the drugs and firearm that were found during the search of his truck.

The parties agree on the central facts. The Coffee County officers made the arrest and carried out the searches incident to it based on their good faith, reasonable belief that there was an outstanding warrant for Herring in Dade County. They found the drugs and firearm before learning that the warrant had been recalled. The erroneous information about the warrant resulted from the negligence of someone in the Dale County Sheriff's Department, and no one in Coffee County contributed to the mistake. The only dispute is whether, under these facts, the exclusionary rule requires the suppression of the firearm and drugs.

A.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." United States Const. Amend. IV. The searches of Herring's person and truck cannot be justified as incident to a lawful arrest because the arrest was not lawful. There was no probable cause for the arrest and the warrant had been rescinded. That means the searches violated Herring's Fourth Amendment rights, but it does not mean that the evidence obtained through them must be suppressed. As the Supreme Court has told us on more than one occasion, whether to apply the exclusionary rule is "an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

The *Leon* case is the premier example of the distinction between finding a constitutional violation and excluding evidence based on that violation. *Leon* held that the exclusionary rule does not bar the use of evidence obtained by officers acting in good faith reliance on a warrant which is later found not to be supported by probable cause. *Id.* at 922. The Court's analysis of whether the exclusionary rule should be applied to constitutional violations stemming from mistakes by judicial officers carried out by law enforcement officers proceeded in two steps. First, the Court considered whether the rule should be applied because it might improve the performance of judges and magistrate judges, and the Court concluded that

was not a good enough reason for applying it. *See id.* at 916-17 ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."); *see also Illinois v. Krull,* 480 U.S. 340, 348 (1987). Second, the Court considered whether, and if so how much, application of the exclusionary rule in that circumstance might be expected to improve the behavior of law enforcement officers, and it concluded that any slight deterrent benefit provided by applying the rule would be outweighed by the heavy costs of excluding relevant and material evidence. *Leon,* 468 U.S. at 920-22 ("We conclude that the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."); *see also Krull,* 480 U.S. at 348; *United States v. Accardo,* 749 F.2d 1477, 1480 (11th Cir.1985) (characterizing *Leon* as establishing that the exclusionary rule "remains viable only as a deterrent to police misconduct").

A decade later, in *Arizona v. Evans,* 514 U.S. 1 (1995), the Court extended *Leon*'s "good faith exception" to the exclusionary rule to circumstances in which officers rely in good faith on a court employee's representation that a valid warrant existed when, in fact, the warrant has previously been quashed. *Id.* at 14. The government contends that *Evans* involved essentially the same situation as this case and that the *Evans* decision standing alone justifies the admission of the illegally obtained evidence here. We think, however, that this effort by the government to justify its capture of Herring red-handed relies on a red herring. The Supreme Court in

Evans expressly declined to address whether the exclusionary rule should be applied when police personnel rather than court employees are the source of the error, *id.* at 15 n. 5, thereby disavowing any decision on the issue the government argues the Court decided.

For guidance on this issue we return to *Leon.* The opinion in that case instructs us that "[w]hether the exclusionary sanction is appropriately imposed in a particular case ... must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence." 468 U.S. at 906. A rule that denies the jury access to probative evidence "must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness." *Gates,* 462 U.S. at 257-58. That means the exclusionary rule should only be applied to a category of cases if it will "result in appreciable deterrence." *United States v. Janis,* 428 U.S. 433, 454 (1976). Application of the rule is unwarranted where "[a]ny incremental deterrent effect ... is uncertain at best." *United States v. Calandra,* 414 U.S. 338, 351 (1974). The possibility that application of the exclusionary rule in a situation may deter Fourth Amendment violations to some extent is not enough. *Alderman v. United States,* 394 U.S. 165, 174 (1969); *see Leon,* 468 U.S. at 910. Instead, the test for extending the exclusionary rule is whether the costs of doing so are outweighed by the deterrent benefits. *Leon,* 468 U.S. at 910.

The "substantial social costs exacted by the exclusionary rule" are well known. *Id.* at 907. The Supreme Court has "consistently recognized that

unbending application of the exclusionary sanction . . . would impede unacceptably the truth-finding functions of judge and jury," *United States v. Payner,* 447 U.S. 727, 734 (1980), and it has "repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Pa. Bd. of Prob. & Parole v. Scott,* 524 U.S. 357, 364-65 (1998). For that reason, suppression of evidence has always been a last resort, not a first impulse. *Hudson v. Michigan,* --- U.S. ---- (2006).

Unlike the costs of applying the exclusionary rule, the benefits of doing so are hard to gauge because empirical evidence of the rule's deterrent effect is difficult, if not impossible, to come by. See *Janis,* 428 U.S. at 449-53. Even if we could measure or approximate any deterrent effect that the exclusionary rule produces, in order to value that effect we must identify the intended target of the deterrence. *Id.* at 448 ("In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred."). It is this question that the first part of *Leon* and nearly all of *Evans* addresses. *See Leon,* 468 U.S. at 913-17; *Evans,* 514 U.S. at 11-17. The answer that both cases give is that the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of others (in those cases, judicial magistrates and court clerks). *Leon,* 468 U.S. at 916; *Evans,* 514 U.S. at 11. Our decisions give the same answer. *See, e.g., United States v. Martin,* 297 F.3d 1308, 1313 (11th Cir.2002); *Accardo,* 749 F.2d at 1480. Misconduct by other actors is a proper target of the exclusionary rule only

insofar as those others are "adjuncts to the law enforcement team." *Evans,* 514 U.S. at 15.

To sum up, our review of *Leon* identifies three conditions that must occur to warrant application of the exclusionary rule. First, there must be misconduct by the police or by adjuncts to the law enforcement team. *Id.* at 913-17.[1] Second, application of the rule must result in appreciable deterrence of that misconduct. *Id.* at 909. Finally, the benefits of the rule's application must not outweigh its costs. *Id.* at 910.

B.

As for the first condition, "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." *Michigan v. Tucker,* 417 U.S. 433, 447 (1974). The conduct in question in this case is the failure of someone inside the Dale County Sheriff's Office to record in that department's records the fact that the arrest warrant for Herring had been recalled or rescinded by the court or by the clerk's office. That failure to bring the records up to date is "at the very least negligent." *See id.* We will assume for present purposes that the negligent actor, who is unidentified in the record, is an adjunct to law enforcement in Dale County and is to be treated for

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[1] In *Evans,* the Supreme Court left open the possibility that the only misconduct which is relevant to an analysis of the exclusionary rule's deterrent effect is that of police officers, as distinguished from non-officer police personnel. 514 U.S. at 15 n. 5. We assume away that issue because it does not matter to our decision in this case.

purposes of the exclusionary rule as a police officer. *See supra* note 1.

As for the second consideration in deciding whether to apply the exclusionary rule to these circumstances, doing so will not deter bad record keeping to any appreciable extent, if at all. There are several reasons for this. For one thing, the conduct in question is a negligent failure to act, not a deliberate or tactical choice to act. There is no reason to believe that anyone in the Dale County Sheriff's Office weighed the possible ramifications of being negligent and decided to be careless in record keeping. Deterrents work best where the targeted conduct results from conscious decision making, because only if the decision maker considers the possible results of her actions can she be deterred.

Another reason that excluding evidence resulting from the negligent failure to update records is unlikely to reduce to any significant extent that type of negligence is that there are already abundant incentives for keeping records current. First, there is the inherent value of accurate record-keeping to effective police investigation. Inaccurate and outdated information in police files is just as likely, if not more likely, to hinder police investigations as it is to aid them. Second, and related to the first reason, there is the possibility of reprimand or other job discipline for carelessness in record keeping. Third, there is the possibility of civil liability if the failure to keep records updated results in illegal arrests or other injury. Fourth, there is the risk that the department where the records are not kept up to date

will have relevant evidence excluded from one of its own cases as a result.

There is also the unique circumstance here that the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of the negligent record keeping, but instead it would scuttle a case brought by officers of a different department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness. We do not mean to suggest that Dale County law enforcement agencies are not interested in the successful prosecution of crime throughout the state, but their primary responsibility and interest lies in their own cases. Hoping to gain a beneficial deterrent effect on Dale County personnel by excluding evidence in a case brought by Coffee County officers would be like telling a student that if he skips school one of his classmates will be punished. The student may not exactly relish the prospect of causing another to suffer, but human nature being what it is, he is unlikely to fear that prospect as much as he would his own suffering. For all of these reasons, we are convinced that this is one of those situations where "[a]ny incremental deterrent effect which might be achieved by extending the rule . . . is uncertain at best," *Calandra,* 414 U.S. at 348, where the benefits of suppression would be "marginal or nonexistent," *Leon,* 468 U.S. at 920-22, and where the exclusionary rule would not "pay its way by deterring official lawlessness," *Gates,* 462 U.S. at 257-58.

Turning to the third *Leon* condition, any minimal deterrence that might result from applying the exclusionary rule in these circumstances would

not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence. *Leon,* 468 U.S. at 910.

In closing, we note, as the Supreme Court did in *Leon,* that the test for reasonable police conduct is objective. 468 U.S. at 919 n. 20. The district court found that "there [was] no credible evidence of routine problems with disposing of recalled warrants" and updating records in Dale County, and Herring does not contest that finding. If faulty record-keeping were to become endemic in that county, however, officers in Coffee County might have a difficult time establishing that their reliance on records from their neighboring county was objectively reasonable. The good faith exception to the exclusionary rule does not shelter evidence that was obtained in an unconstitutional arrest or search that was based on objectively unreliable information. *See Evans,* 514 U.S. at 17 (O'Connor, J., concurring).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,

MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

Criminal Action No. 1:05cr161-T (WO)

UNITED STATES OF AMERICA

v.

BENNIE DEAN HERRING

October 26, 2005

MYRON H. THOMPSON, District Judge.

Defendant Bennie Dean Herring is charged with one felony count of being a convicted felon in possession of a firearm, 18 U.S.C.A. § 922(g)(1), and one misdemeanor count of intentionally and knowingly possessing a mixture or substance containing a detectable amount of methamphetamine, 21 U.S.C.A. § 844(a). On October 24, 2005, this court adopted the recommendation of the United States Magistrate Judge that Herring's motion to suppress certain "physical evidence" recovered incident to his arrest and search be denied. The court said that a memorandum opinion would follow. This is the promised opinion.

I. Factual Background

On July 7, 2004, Herring drove to the Coffee County, Alabama Sheriff's Department to check on a vehicle that had been impounded. As Herring was

leaving, Investigator Mark Anderson asked Sandy Pope, the warrant clerk for the Coffee County Sheriff's Department, to check whether there were any outstanding warrants in Coffee County for Herring. Pope checked her computer database and advised Anderson that there were no active warrants. Anderson then asked Pope to call the neighboring Dale County Sheriff's Department to see if it had any active warrants for Herring. Pope telephoned Sharon Morgan, the Dale County Sheriff's Department warrant clerk, who reported an active Dale County felony warrant for Herring for a failure to appear. Pope asked Morgan to fax her a copy of the warrant, and informed Anderson of the outstanding warrant.

Anderson and another officer then left the station, pursued Herring, and arrested him. After Herring was placed under arrest, Anderson searched his front pocket and found a plastic bag containing a powder substance later identified as methamphetamine. A search of Herring's vehicle uncovered a handgun, ammunition, and a knife.

While the arrest and search were occurring, Morgan unsuccessfully tried to locate Herring's warrant. She then called the Dale County Circuit Clerk's Office to see if it had the warrant. Although the Dale County Sheriff's Department and the Clerk's Office are housed in the same building, they have separate computer systems.

The Dale County Clerk's Office informed Morgan that the warrant had been recalled. Normally, Morgan will receive a call from the Clerk's Office, or sometimes from a judge's chambers, alerting her that a warrant has been recalled. Morgan then looks in

her computer, finds where the warrant is physically located, and disposes of it. In this instance, however, Morgan had no notice of the recall in her computer.

According to Morgan, Herring's recalled warrant had been returned to the Dale County Clerk's Office without there being a notation of it in the Sheriff's Department's computer system. Morgan admits the mistake was probably the fault of the Dale County Sheriff's Department, not that of the Dale County Clerk's Office.

Upon discovering the mistake, Morgan called Pope to alert the Coffee County authorities. Pope, in turn, called the officers on the scene of Herring's arrest. She explained that there was a problem with the warrant. However, the officers had already completed the arrest and search of Herring before learning this information. About ten to 15 minutes elapsed between when Morgan informed Pope that an active warrant existed and when she called back to rescind that statement.

Herring was later indicted on the charges now before the court.

II. Discussion

In *Arizona v. Evans,* 514 U.S. 1 (1995), the Supreme Court recognized a good-faith exception to the exclusionary rule for evidence seized incident to an arrest occurring as a result of erroneous computer records kept by court employees indicating a valid arrest warrant; there the court clerk failed to inform the sheriff's warrant clerk to remove the warrant at issue. The Court reasoned that: (1) the exclusionary

rule was historically designed as a means of deterring police misconduct, not mistakes by court employees; (2) there was no evidence that court employees were inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion; and (3) there was no basis for believing that the exclusionary rule would significantly affect court employees responsible for informing the police that a warrant has been quashed since these employees are not adjuncts to the law enforcement team. *Id.* at 15-16. The Court declined to determine whether its holding would apply if police personnel were responsible for the error. *Id.* at 16 n. 5.

Herring's case, unlike the circumstances in *Evans,* involves a mistake on the part of law enforcement personnel. Thus, the question for this court is whether the good-faith exception to the exclusionary rule, as articulated in *Evans,* should be extended to mistakes by police personnel. In unpublished opinions, both the Fifth and the Fourth Circuits stated that the exception should be so extended as long as the circumstances at issue fell within those contemplated in *Evans* and *United States v. Leon,* 468 U.S. 897 (1984), and, more specifically, the appellate courts held that the exception should be extended to circumstances almost identical to those regarding the error in the warrant for Herring. *United States v. Castaneda,* 273 F.3d 1094, 2001 WL 1085086 (5th Cir.2001); *United States v. Williams,* 1998 WL 276460, 1998 U.S.App. Lexis 10501 (4th Cir.1998).

This court also takes guidance in resolving this issue from the reasoning set forth in Justice O'Connor's concurrence in *Evans*. She notes that the invocation of the good-faith exception to the exclusionary rule should depend on the reasonableness of the police officers' reliance on the recordkeeping system itself. *Evans,* 514 U.S. at 17. Thus, the good-faith exception should not apply where there is "no mechanism to ensure [the recordkeeping's] system accuracy over time" and where the system "routinely leads to false arrests." *Id.* In the instant case, the mistake was discovered and corrected within ten to 15 minutes. In addition, there is no credible evidence of routine problems with disposing of recalled warrants.

To be sure, during the first of two suppression hearings, Morgan testified as follows:

> "Q. All right. Ma'am, how many times have you had or has Dale County had problems, any problems with communicating about warrants?"
>
> "A. Several times."

During the second hearing she denied that she had said "several times": "I did not say that. I most emphatically did not say that because that most emphatically is not the case." The court has reviewed the court reporter's tape of the first hearing and finds that Morgan did, indeed, say "several times" in response to the question.

However, having made that finding, the court still must conclude that Morgan's "several times" statement is confusing and essentially unhelpful. At

both hearings, it is unclear whether Morgan and her questioner were talking about communication problems between the Dale County Sheriff's Department and the Coffee County Sheriff's Department or between the Dale County Sheriff's Department and the Dale County Clerk's Office; in fact, her statement, when considered in the context of all her testimony, suggests that the former may have been the subject. The critical question for the court is whether there was a communication problem regarding recall warrants between the Dale County Sheriff's Department and the Dale County Clerk's Office, and both the warrant and court clerks from Dale County testified to this court that their recordkeeping systems were, and are, "reliable," that is, that persons receiving information should "be able to rely on what" they are told by the clerks.

For these reasons, the court adopted the recommendation of the United States Magistrate Judge that Herring's motion to suppress certain "physical evidence" be denied.

OPPOSITION BRIEF

No. 07-513

In the Supreme Court of the United States

BENNIE DEAN HERRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule applies when a police officer makes an arrest after receiving information from a different law enforcement agency about an outstanding warrant, and the information was incorrect because of a negligent error by that agency.

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In the Supreme Court of the United States

No. 07-513

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 492 F.3d 1212. The opinion of the district court (Pet. App. 13a-18a) is reported at 451 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2007. The petition for a writ of certiorari was filed on October 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and

possession of methamphetamine, in violation of 21 U.S.C. 844(a). He was sentenced to 27 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-12a.

1. On July 7, 2004, Investigator Mark Anderson of the Coffee County Sheriff's Department learned that petitioner was present at the Sheriff's Department, retrieving property from an impounded vehicle. Pet. App. 2a, 13a-14a. Investigator Anderson, who knew petitioner and "had reason to suspect that there might be an outstanding warrant for his arrest," asked Sandy Pope, the warrant clerk for the Coffee County Sheriff's Department, to check the county database. *Id.* at 2a. When Pope reported that there were no active warrants in Coffee County, Investigator Anderson asked her to check with neighboring Dale County. *Ibid.* Pope telephoned the Dale County Sheriff's Department, and was told by its warrant clerk that a check of a database maintained by the Dale County Sheriff's Department revealed that there was an active felony warrant for petitioner's arrest. *Ibid.* Pope asked the Dale County warrant clerk to fax her a copy of the warrant, and relayed the information about the warrant to Investigator Anderson. *Ibid.*

Investigator Anderson and a deputy sheriff left the station to pursue petitioner, who was already leaving in a pickup truck. Pet. App. 2a. The officers pulled over petitioner's truck and placed him under arrest. *Ibid.* In petitioner's right front pocket, the officers found methamphetamine. *Id.* at 14a. Under the front seat of the pickup, they found a handgun. *Id.* at 3a.

Meanwhile, the Dale County warrant clerk tried to locate a copy of the warrant for petitioner's arrest. Pet. App. 3a. Unable to find it, she called the Dale County

Clerk's Office, and was told that the warrant had been recalled. *Id.* at 3a, 14a. The Dale County warrant clerk "immediately" called Pope, who relayed the information to Investigator Anderson and the deputy sheriff. *Id.* at 3a. By that point, however, the officers had already arrested petitioner and searched his person and the pickup. *Ibid.* Between 10 and 15 minutes elapsed between the time the Dale County warrant clerk told Pope that there was an active warrant for petitioner's arrest, and when she called back with the correct information. *Ibid.*

2. A grand jury sitting in the Middle District of Alabama charged petitioner with one count of possessing a firearm after having been convicted of a felony and one count of possession of methamphetamine. Pet. App. 3a. Petitioner moved to suppress the physical evidence against him on the ground that it was the fruit of an unlawful arrest. *Ibid.*

After holding a suppression hearing, a magistrate judge recommended that petitioner's motion be denied. Pet. App. 3a-4a. After holding a supplemental hearing, the district court issued an opinion adopting the magistrate judge's recommendation. *Id.* at 13a-18a. The court found that where a warrant has been recalled, the Dale County Sheriff's Department's warrant clerk will "[n]ormally" receive a phone call from either the Dale County Clerk's Office or a judge's chambers, enter that information in the Dale County Sheriff's Department's computer system, and dispose of the physical copy of the warrant. *Id.* at 14a-15a. In this case, although the recalled warrant for petitioner's arrest had been returned to the Dale County Clerk's Office, the Dale County Sheriff's Department's computer system did not reflect that fact. *Id.* at 15a. Although it did not make a specific

finding, the district court accepted the testimony of the Dale County warrant clerk that "the mistake was probably the fault of the Dale County Sheriff's Department, not that of the Dale County Clerk's Office." *Ibid.*

The district court determined that this Court's decision in *Arizona* v. *Evans*, 514 U.S. 1 (1995), which recognized an exception to the exclusionary rule for arrests that occur as a result of erroneous computer records kept by court employees, should be extended to cover similar mistakes by law enforcement personnel so long as there is a "mechanism to ensure [the recordkeeping's] system accuracy over time" and there is no evidence that "the system 'routinely leads to false arrests.'" Pet. App. 17a (brackets in original) (quoting *Evans*, 514 U.S. at 17 (O'Connor, J., concurring)). In this case, the district court found that "the mistake was discovered and corrected within ten to 15 minutes," that there was "no credible evidence of routine problems with disposing of recalled warrants," and that the recordkeeping systems of both the Dale County Clerk's Office and the Dale County Sheriff's Office "were, and are, 'reliable.'" *Id.* at 17a-18a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court concluded that "the searches violated [petitioner's] Fourth Amendment rights," because petitioner's arrest had not been supported by probable cause or a warrant. *Id.* at 5a. But the court also stated that "whether to apply the exclusionary rule is 'an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Ibid.* (brackets in original) (quoting *United States* v. *Leon*, 468 U.S. 897, 906 (1984), and *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983)). Applying the framework developed in *Leon* and

Evans, the court of appeals determined that suppression is not warranted unless there was "misconduct by the police or by adjuncts to the law enforcement team," "application of the [exclusionary] rule [will] result in appreciable deterrence of that misconduct," and "the benefits of the rule's application [will] not outweigh its costs." *Id.* at 9a.

As for the first condition, the court of appeals determined that "[t]he conduct in question" was the failure of an unidentified person in the Dale County Sheriff's Department "to record in the department's records the fact that the arrest warrant for [petitioner] had been recalled or rescinded." Pet. App. 9a. The court described that conduct as "at the very least negligent," and it "assume[d] for present purposes that the negligent actor * * * is an adjunct to law enforcement in Dale County and is to be treated for purposes of the exclusionary rule as a police officer." *Ibid.*; see *id.* at 9a n.1 (stating that this Court's decision in *Evans* "left open the possibility that the only misconduct which is relevant to an analysis of the exclusionary rule's deterrent effect is that of police officers, as distinguished from non-officer police personnel," but that the court "assum[ed] away that issue because it does not matter to our decision in this case").

Turning to the second issue, the court of appeals concluded, for "several reasons," that applying the exclusionary rule in "these circumstances * * * will not deter bad recordkeeping to any appreciable extent, if at all." Pet. App. 10a. The court stated that "[d]eterrents work best where the targeted conduct results from conscious decision making," but here "[t]here is no reason to believe that anyone in the Dale County Sheriff's Office weighed the possible ramifications of being negligent and decided to be careless in record keeping."

Ibid. The court of appeals also observed "that there are already abundant incentives for keeping records current," including "the inherent value of accurate record-keeping to effective police investigation," "the possibility of reprimand or other job discipline for carelessness," "the possibility of civil liability" for illegal arrests or other injury, and the "risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result." *Id.* at 10a-11a. In addition, the court of appeals emphasized "the unique circumstance here that the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of the negligent record keeping, but instead it would scuttle a case brought by officers of a differe t department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness." *Id.* at 11a. In the court's view, "[h]oping to gain a beneficial deterrent effect on Dale County personnel by excluding evidence in a case brought by Coffee County officers would be like telling a student that if he skips school one of his classmates will be punished." *Ibid.*

Finally, the court of appeals determined that "any minimal deterrence that might result from applying the exclusionary rule in these circumstances would not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence." Pet. App. 11a-12a. The court of appeals emphasized, however, "that the test for reasonable police conduct is objective." *Id.* at 12a. Accordingly, "[i]f faulty record-keeping were to become endemic in [Dale County], * * * officers in Coffee County might have a difficult time establishing that their reliance on records from their neighboring county

was objectively reasonable." *Ibid.* (citing *Evans*, 514 U.S. at 17 (O'Connor, J., concurring)).

ARGUMENT

Petitioner contends (Pet. 10, 27) that the Eleventh Circuit has extended this Court's decision in *Arizona* v. *Evans*, 514 U.S. 1 (1995), to cover all negligent errors by law enforcement personnel. He argues that such an extension is unwarranted, and urges this Court to adopt the opposite per se rule and direct the exclusion of any evidence seized incident to an arrest that results from the negligence of any law enforcement agent. Pet. 8, 20-22, 29-30. The Eleventh Circuit, however, did not extend *Evans* to all negligent errors by law enforcement. Instead, the court held that application of the exclusionary rule was inappropriate "in these circumstances," which include "the unique circumstance" that the sanction here would be levied in a case "brought by officers of a different department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness," and where no showing was made that the agency that provided the information routinely had problems purging its records of recalled warrants. Pet. App. 11a. The court correctly concluded that, in those circumstances, the high costs of suppressing probative evidence were not justified by the marginal interest in seeking to deter negligent conduct by a neighboring law enforcement agency. Its decision does not conflict with the decisions of any other federal court of appeals, and the claimed conflict with state cases does not warrant further review.

1. This Court has repeatedly emphasized that the exclusionary rule is "neither intended nor able to 'cure the invasion of the defendant's rights which he has al-

ready suffered'"; rather, it "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); see *United States* v. *Leon*, 468 U.S. 897, 906 (1984); *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). Accordingly, "[s]uppression of evidence * * * has always been [a] last resort, not [a] first impulse," *Hudson* v. *Michigan*, 126 S. Ct. 2159, 2163 (2006), and, "[a]s with any remedial device, the [exclusionary] rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served," *Evans*, 514 U.S. at 11.

In *Leon*, this Court concluded "that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 468 U.S. at 922. After determining that exclusion of such evidence could not be justified by "its behavioral effects on judges and magistrates," *id.* at 916; see *id.* at 916-917, the Court rejected as "speculative" the arguments that suppression would deter "magistrate shopping" or "encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors." *Id.* at 918. Accordingly, the Court held that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Ibid.*

In *Evans*, this Court applied the *Leon* analysis to evidence seized by an officer who had acted in reliance on an erroneous entry in a police computer system indicating that there was an outstanding warrant for the

defendant's arrest. 514 U.S. at 3-4, 14-16. Assuming for purposes of its decision that "the erroneous information resulted from an error committed by an employee of the office of the Clerk of Court," *id.* at 4, the Court concluded that "the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction," *id.* at 14. The Court explained that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees," and it perceived "no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed." *Id.* at 15; see *ibid.* (noting that "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" and have "no stake in the outcome of particular criminal prosecutions"). The Court also stated that application of the exclusionary rule "could not be expected to alter the behavior of the arresting officer," because there was "no indication that [he] was not acting objectively reasonably when he relied upon the police computer record." *Id.* at 15-16.

Petitioner correctly notes (Pet. 8-10, 22), that the "categorical exception to the exclusionary rule" announced in *Evans*, see 514 U.S. at 16, does not directly control here because both the district court (Pet. App. 15a, 18a) and the court of appeals (*id.* at 9a n.1, 11a) proceeded on the assumption that his arrest resulted from an error by the Dale County Sheriff's Office rather than the Dale County Clerk's Office. See *Evans*, 514 U.S. at 16 n.5 ("declin[ing] to address" whether a similar analysis "would apply in order to determine whether the evidence should be suppressed if police personnel were

responsible for the error"). Petitioner errs in assuming, however, that *some* categorical rule must apply to evidence seized as a result of an error by any person who can be characterized as an "adjunct[] to the law enforcement team." *Id.* at 15.

To the contrary, this Court's decisions "do not dictate * * * a similar categorical approach with respect to police clerical errors." U.S. Br. at 12, *Arizona* v. *Evans*, 514 U.S. 1 (1995) (No. 93-1660). In situations where a person affiliated with the police transmits erroneous information to an arresting officer, exclusion of any resulting evidence could conceivably deter future Fourth Amendment violations. *Ibid.* But this Court has repeatedly rejected the view that the Fourth Amendment "requires adoption of every proposal that might deter police misconduct," *Hudson*, 126 S. Ct. at 2166 (quoting *Calandra*, 414 U.S. at 350), and whether the exclusionary rule should be applied in situations involving clerical errors by law enforcement officials "depends on the type of error and the circumstances in which it arises." U.S. Br. at 7, *Arizona* v. *Evans*, 514 U.S. 1 (1995) (No. 93-1660); see *Evans*, 514 U.S. at 11 (exclusionary rule applies only "where its remedial objectives are thought most efficaciously served."); *United States* v. *Janis*, 428 U.S. 433, 454 (1976) (where "the exclusionary rule does not result in appreciable deterrence, then, clearly, its use * * * is unwarranted."). And where, as here, (1) the error was negligent rather than deliberate, (2) the error was made by a different law enforcement agency than the one that made the arrest, and (3) the recordkeeping system is generally reliable, the balance tips against suppressing highly probative and intrinsically reliable evidence.

Although petitioner contends (Pet. 23-29) that the Eleventh Circuit's decision is incorrect, he identifies no significant flaws in its analysis. Most importantly, petitioner fails to refute the proposition that excluding evidence is unlikely to provide any significant deterrent benefits in situations where the law enforcement agency that made the negligent error will not bear the brunt of the sanction of exclusion.

Petitioner contends that, because an arresting officer may rely on the knowledge of other law enforcement agencies to establish probable cause, he should also be charged with knowledge of any mistakes made by those agencies that might render the arrest illegal. Pet. 27-29. But that argument fails to distinguish between whether an arrest is lawful and whether the exclusionary rule applies to its fruits. This Court made precisely that point in *Evans* while addressing *Whiteley* v. *Warden*, 401 U.S. 560 (1971), a case on which petitioner relies. Pet. 28. In *Whiteley*, this Court concluded that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." 401 U.S. at 568. But in *Evans*, this Court observed that "[a]lthough *Whiteley* clearly retains relevance in determining whether police officers have violated the Fourth Amendment," its "precedential value" regarding application of the exclusionary rule is "dubious" because *Whiteley* involved the sort of "reflexive application of the exclusionary rule" that the Court has rejected in more recent cases. *Evans*, 514 U.S. at 13; see *Hudson*, 126 S. Ct. at 2164 (stating that the Court has "long since rejected" the approach of *Whiteley* and similar cases). As *Evans* reiterates, "the issue of exclusion is separate from whether the Fourth Amendment has been violated" and "exclu-

sion is appropriate only if the remedial objectives of the rule are thought most efficaciously served." 514 U.S. at 13-14; see *Leon*, 468 U.S. at 906. The relevant question, therefore, is not whether law enforcement is a "collaborative effort" (Pet. 28), but whether sanctioning one law enforcement agency for the apparently isolated negligent mistake of another will be efficacious in deterring future errors. The Eleventh Circuit correctly determined that it would not, and thus appropriately declined to treat "law enforcement" as a single entity for purposes of the exclusionary rule.[1]

Although petitioner also disputes (Pet. 23-27) the Eleventh Circuit's additional reasons for finding that

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[1] Petitioner contends that various decisions interpreting *Miranda* v. *Arizona*, 384 U.S. 436 (1966), support his claim that Investigator Anderson should be held responsible for the negligence of an unknown person in the Dale County Sheriff's Office. Pet. 28-29. But the jurisprudence developed under the Fourth Amendment exclusionary rule and under the *Miranda* decision are not interchangeable. See *Dickerson* v. *United States*, 530 U.S. 428, 441 (2000) ("unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment"); *Withrow* v. *Williams*, 507 U.S. 680, 686-695 (1993) (restrictions on exercise of federal habeas jurisdiction in Fourth Amendment cases do not apply to claims under *Miranda*); *Oregon* v. *Elstad*, 470 U.S. 298, 303-304 (1985) (refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases to the *Miranda* context, due to the "fundamental differences" between two doctrines). Moreover, even if this Court's Fifth Amendment decisions were relevant here, *Arizona* v. *Roberson*, 486 U.S. 675 (1988) (Pet. 28), is not analogous to this case: Whereas the officer who interrogated Roberson after he invoked his *Miranda* rights should have known that the interrogation was unlawful, *id.* at 687-688, here it is not disputed that "[t]he Coffee County officers made the arrest and carried out the searches incident to it based on their good faith, reasonable belief that there was an outstanding warrant for [petitioner] in Da[l]e County," Pet. App. 4a.

suppression is not appropriate here, none of his arguments undermines the decision below. First, the Eleventh Circuit did not conclude that "negligence cannot be meaningfully deterred." Pet. 23. Instead, it observed that "[d]eterrents work *best* when the targeted conduct results from conscious decisionmaking" and that "a negligent *failure to act*" is more difficult to deter than "a deliberate or tactical choice to act." Pet. App. 10a (emphases added). Those observations are self-evidently true, and petitioner does not contend otherwise.

Second, petitioner denies that "the inherent value of accurate record-keeping" (Pet. App. 10a) provides any incentive for expunging recalled or otherwise invalid warrants from databases, arguing that providing erroneous information about such warrants may aid the police by "enlarging the officers' perceived authority to act" in cases where they want to investigate an individual for wrongdoing. Pet. 25. But police officers do not "check computer databases only when they want to investigate an individual whom they suspect of wrongdoing." *Ibid.* Indeed, Investigator Anderson directed Pope to check the Coffee and Dale County records not to investigate petitioner, but to ensure that any outstanding warrants were properly served. Pet. App. 2a; 9/29/05 Tr. 8-9, 20-21. Moreover, in most cases, an arrest pursuant to an invalid warrant will represent a fruitless waste of police resources. Thus, as the Eleventh Circuit noted, "[i]naccurate and outdated information in police files is just as likely, if not more likely, to hinder police investigations as it is to aid them." Pet. App. 10a.

Third, petitioner denies that any "possibility of reprimand or other job discipline for carelessness in record keeping" exists among law enforcement agents. Pet. 25-

26 (emphasis deleted) (quoting Pet. App. 10a). Petitioner cites no evidence for that assertion, and common sense suggests otherwise. Virtually all employees are subject to reprimand and discipline for shoddy record-keeping, and there is no reason to believe that police department employees are somehow unique in this regard. See *Hudson*, 126 S. Ct. at 2168 (describing "the increasing professionalism of police forces, including a new emphasis on internal police discipline").

Fourth, petitioner contends that "no authority" supports the Eleventh Circuit's statement that "there is the possibility of civil liability if the failure to keep records updated results in illegal arrests or other injury." Pet. 26-27 (emphasis deleted) (quoting Pet. App. 10a). Petitioner is incorrect. Apart from any remedies state law may provide, the victim of an illegal arrest caused by inaccurate police records may be able to seek redress against the responsible officers under 42 U.S.C. 1983. While qualified immunity may prevent recovery in many cases, it does not necessarily provide a complete defense. See, *e.g.*, *Bibart* v. *Stachowiak*, 888 F. Supp. 864, 867-868 (N.D. Ill. 1995) (holding that a dispatcher who misread a computerized record was not entitled to qualified immunity as a matter of law in suit brought by person arrested as a result of the error); *Kirk* v. *Hesselroth*, 707 F. Supp. 1149, 1152, 1155 (N.D. Cal. 1989) (same result as to police department inspector who caused the plaintiff's arrest by entering inaccurate information into a computer database). Indeed, a judge in the Eastern District of California recently declined to grant summary judgment based on qualified immunity to the arresting officers in *People* v. *Willis*, 46 P.3d 898 (Cal. 2002), one of the decisions on which petitioner relies. Pet. 15, 24, 28; see *infra* at 19 n.6. See *Willis* v. *Mul-*

lins, 517 F. Supp. 2d 1206 (E.D. Cal. 2007). There may also be situations in which recovery may be had against a municipality if the error resulted from the municipality's own policies, customs, or usages. See *Berg* v. *County of Allegheny*, 219 F.3d 261, 275-277 (3d Cir. 2000) (per curiam) (municipality was not entitled to summary judgment in Section 1983 case where it employed a system for issuing arrest warrants "where the slip of a finger could result in wrongful arrest and imprisonment"), cert. denied, 531 U.S. 1072, and 531 U.S. 1145 (2001); *Rogan* v. *City of Los Angeles*, 668 F. Supp. 1384 (C.D. Cal. 1987) (City of Los Angeles responsible as a matter of law for plaintiff's repeated arrests pursuant to a computer record that failed to describe suspect with particularity). In short, the threat of civil litigation may provide a substantial deterrent to police errors that result in unlawful arrests.

2. No "deeply entrenched" conflict (Pet. 17) exists with respect to the issue presented here. In the 13 years since *Evans* was decided,[2] no other federal court of appeals has issued a published decision addressing whether the exclusionary rule applies when a police officer makes an arrest based on that officer's objectively reasonable reliance on incorrect information from a dif-

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[2] Before *Evans*, the Fifth Circuit applied the good-faith exception to evidence seized following a *Terry* stop that had been made partly in reliance on a dispatcher error. *United States* v. *De Leon-Reyna*, 930 F.2d 396 (1991) (en banc) (Pet. 11). The Fifth Circuit has not revisited that holding in a published decision since *Evans*, although an unpublished decision concluded, citing *De Leon-Reyna*, that "the good faith exception to the exclusionary rule applies regardless of whether the error was by court clerks or police personnel." *United States* v. *Castaneda*, No. 01-10228, 2001 WL 1085086, at *1 (Aug. 29, 2001) (Pet. 11).

ferent law enforcement agency.[3] Moreover, the only unpublished decision to have considered the issue reached the same conclusion as the decision below. In *United States* v. *Williams*, No. 97-4849, 1998 WL 276460 (May 27, 1998), the Fourth Circuit declined to suppress evidence when an officer in Prince George's County, Maryland, had made an arrest based on incorrect infor-

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[3] Although he cites them (Pet. 12 n.2; Pet. 16 n.4), petitioner does not assert that the Eleventh Circuit's decision conflicts with *United States* v. *Santa*, 180 F.3d 20 (2d Cir.), cert. denied, 528 U.S. 943 (1999), *United States* v. *Shareef*, 100 F.3d 1491 (10th Cir. 1996), or *United States* v. *Southerland*, 486 F.3d 1355 (D.C. Cir.), cert. denied, 128 S. Ct. 414 (2007). In *Santa*, the Second Circuit observed that "*Evans*'s categorical exception to the exclusionary rule applies only when police rely on erroneous computer records resulting from 'clerical errors of court employees.'" 180 F.3d at 29 (quoting *Evans*, 514 U.S. at 16). That statement, however, merely identified the parameters of *Evans*' holding, and because the Second Circuit concluded that the error in that case was "attributable to court employees rather than to police personnel," *ibid.*, it had no occasion to consider whether a good-faith exception (categorical or not) could ever apply to evidence obtained as a result of law enforcement errors. In *Shareef*, the Tenth Circuit stated that "the exclusionary rule applies when an error by a dispatcher or an officer leads to a Fourth Amendment violation." 100 F.3d at 1503. But that statement was clearly *dicta*, because the court ultimately found that no Fourth Amendment violation had occurred. *Ibid.* In addition, because *Shareef* did not involve an arrest based on mistaken information provided by a different law enforcement agency, petitioner acknowledges that it "involve[d] [a] different kind[] of error[] than" the one at issue in this case. Pet. 16 n.4. In *Southerland*, the District of Columbia Circuit suggested that the exclusionary rule should not be applied when officers reasonably rely on incorrect information from the Department of Motor Vehicles (DMV). See 100 F.3d at 1360-1361. That discussion, however, was *dicta*, because the defendant had failed to establish that he was arrested based on incorrect information, or to contend in a timely fashion that the DMV was a law enforcement agency. *Id.* at 1359, 1360. See Pet. 12 n.2 (acknowledging that *Southerland* made no holding with respect to the question before the Court).

mation about an outstanding warrant from Frederick County, Maryland. See *id.* at *3. Contrary to petitioner's assertion, *Williams* did not "interpret *Evans* as exempting all clerical errors from the exclusionary rule." Pet. 11. Rather, in that unpublished decision, the Fourth Circuit acknowledged that *Evans* "did not address" the situation "where erroneous information was prepared by law enforcement personnel," 1998 WL 276460, at *2, but concluded that "[a]pplying the exclusionary rule to the handgun in [that] case" was unwarranted because the arresting officer's conduct had been objectively reasonable, and because doing so "would serve no other purpose than * * * to make [an officer] less willing to do his duty" to make an arrest, *id.* at *3 (brackets in original) (quoting *Leon*, 468 U.S. at 920, and *Stone* v. *Powell*, 428 U.S. 465, 539-540 (1976) (White, J., dissenting)).[4]

Nor is there a direct conflict between the decision below and any of the state supreme court decisions cited by petitioner. Pet. 13-14. Petitioner relies most heavily on *Shadler* v. *State*, 761 So. 2d 279 (Fla.), cert. denied, 531 U.S. 924 (2000). In *Shadler*, the defendant was arrested after a computer database incorrectly indicated that his driver's license had been suspended. *Id.* at 280-281. The Florida Supreme Court ordered suppression

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[4] In *United States* v. *Sparks*, 37 Fed. Appx. 826 (2002) (Pet. 12 n.2), an Eighth Circuit panel declined to order suppression when a police dispatcher mistyped license plate information relayed by the arresting officer, and thus erroneously told the officer that the plates belonged to a wholly different vehicle. The court of appeals observed that both the dispatcher and the officer had acted in good faith, and that had the dispatcher entered the correct information, the officer would have learned that the license plates on the defendant's car had expired one month earlier. See *id.* at 827-828, 829.

of narcotics seized during a search incident to that arrest, reasoning that suppression was required under its previous decision in *State* v. *White*, 660 So. 2d 664 (Fla. 1995). See Pet. 14; *Shadler*, 761 So. 2d at 282-286.[5] In so holding, the court emphasized that the database was maintained by a division of the Department of Highway Safety that was a "sister division[]" of, and performed "interrelated functions" with, the Florida Highway Patrol. *Id.* at 283 n.3; see *id.* at 282-284. *Shadler* did not discuss whether the arresting officer was himself an agent of the Florida Highway Patrol. But the court's analysis presumed that the police officers who would bear the brunt of excluding the resulting evidence were "fellow employees" of those responsible for maintaining the database, with an "institutional obligation [and] a direct mechanism for [providing] feedback [about] * * * the effect of the exclusionary rule." *Id.* at 286. In this case, however, no such obligation or mechanism exists, because Investigator Anderson was not a "fellow employee" of anyone in the Dale County Sheriff's Office. See *Commonwealth* v. *Wilkerson*, 763 N.E.2d 508, 512 (Mass. 2002) (distinguishing *Shadler* on the ground that exclusion would not "improve record-keeping efforts").

In addition, *Shadler* applied the exclusionary rule to a massive computer database that was accessible to, and

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[5] The *Shadler* court concluded that, under *White*, "if the error causing the arrest is attributable to law enforcement personnel, then the seized evidence must be suppressed under the exclusionary rule." 761 So. 2d at 281. *White*, however, involved a clerical error that was committed by the same sheriff's office that made the arrest. *White*, 660 So. 2d at 666; see *id.* at 668 ("The good faith exception is inapplicable in this instance since it was within the collective knowledge of the sheriff's office that the warrant was void."). That case therefore does not establish a categorical rule that the good-faith exception cannot apply if the error is attributable to any law enforcement personnel.

relied upon by, "every law enforcement agency in the state, from the Highway Patrol to the smallest municipal police department." 761 So. 2d at 284. Given the size of the relevant database, "even a slight error rate puts thousands of Florida's citizens at risk of unlawful arrests and subsequent seizures." *Id.* at 285. Here, by contrast, the relevant database apparently served only a single rural county, and it was not directly accessible by other law enforcement agencies. See p. 2, *supra* (noting that Coffee County warrant clerk called Dale County warrant clerk, who checked the Dale County database). Because the characteristics of specific law enforcement information systems may prove relevant to determining whether an arresting officer's good-faith reliance on those systems warrants an exception to the exclusionary rule, see p. 24, *infra*, this case does not present the same issue as *Shadler* and the two decisions cannot therefore be described as conflicting.[6]

Petitioner also contends (Pet. 14) that the decision below conflicts with *Hoay* v. *State*, 71 S.W.3d 573 (Ark. 2002). In *Hoay*, a police officer made a valid stop of the

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[6] Petitioner also relies (Pet. 15) on *People* v. *Willis*, 46 P.3d 898 (Cal. 2002), a case in which a police officer and a parole officer jointly conducted a search based on outdated information that the defendant was on parole and subject to a warrantless search condition. *Id.* at 899. That decision has no bearing here, because the error in *Willis* was committed by the agency employing one of the two officers involved in the search and may even have been committed by that officer herself. *Id.* at 908-910, 912. In addition, the court suggested that the officers who conducted the search had been negligent in not doing more to determine whether the defendant was actually on parole. *Id.* at 911. Accordingly, although *Willis* suggests that "the good faith exception does not apply where law enforcement is collectively at fault for an inaccurate record that results in an unconstitutional search," *id.* at 915, that statement was *dicta*.

defendant's car, and discovered, after running his driver's license through a database maintained by the National Crime Information Center (NCIC) and speaking with two dispatchers from a neighboring county, that the defendant was subject to an outstanding arrest warrant from the neighboring county. *Id.* at 574. The officer arrested the defendant and discovered drugs on his person. *Ibid.* It was later discovered that the warrant had been quashed before the defendant's arrest. *Ibid.* After noting that the record did not reveal who was responsible for the error, the Arkansas Supreme Court stated that the government had "fail[ed] to address whether [the] good faith" shown by the arresting officer "extended * * * to the law enforcement personnel" in the neighboring county. *Id.* at 577. The court concluded that "[i]t would fly in the face of the *Leon* principle" not to suppress the evidence seized during the defendant's arrest if the law enforcement personnel in the other county were at fault, stating: "If the touchstone of the exclusionary rule is deterrence of police misconduct, as *Leon* makes clear, that rule should apply equally to defective recordkeeping by law enforcement." *Ibid.*

Any tension between the Eleventh Circuit's decision in this case and *Hoay* does not merit this Court's review. *Hoay* involved an error in the NCIC's database, a computer program that contains millions of records and combines information from law enforcement agencies across the nation. See *Evans*, 514 U.S. at 26-27 (Ginsburg, J., dissenting). As noted earlier, the differences between that database and the entirely local one used by Dale County could prove dispositive to the exclusionary rule analysis. See p. 24, *infra*. Moreover, the majority's terse analysis in *Hoay* did not attempt to explain how exclusion of evidence seized by one law enforcement

agency could be expected to improve recordkeeping by an entirely different agency. See *Hoay*, 71 S.W.2d at 578 (Arnold, C.J., dissenting) (arguing that the majority's analysis "implausibl[y]" "lump[ed] *all* police personnel, from whatever county, city, or state, together under the theory that, in doing so, it will have some sort of universal deterrent effect"). Because the *Hoay* decision prompted a vigorous and cogent dissent by three justices that paralleled the reasoning of the Eleventh Circuit's published decision in this case, the Arkansas court may choose to reconsider that decision in the future.[7]

Nor is there any direct conflict between the decision below and *State* v. *Allen*, 690 N.W.2d 582 (Neb. 2005) (Pet. 15). In *Allen*, a police dispatcher misunderstood a licence plate number orally relayed by a police officer, and, as a result, incorrectly told the officer that the plates were not assigned to the vehicle to which they

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[7] Petitioner also claims (Pet. 16-17) that three other state courts of last resort held, before *Evans*, that "the exclusionary rule applies when law enforcement personnel commit clerical errors leading to illegal arrests." Pet. 16. None of these decisions conflicts with the decision below. In *People* v. *Turnage*, 642 N.E.2d 1235 (1994), the Illinois Supreme Court excluded evidence seized pursuant to a repetitive warrant in reliance on *Whiteley* v. *Warden*, 401 U.S. 560 (1971). But, as this Court has subsequently made clear, "[the] precedential value [of *Whiteley*] regarding application of the exclusionary rule is dubious." *Evans*, 514 U.S. at 13; see *Hudson*, 126 S. Ct. at 2164 (stating that this Court has "long since rejected [*Whiteley*'s] approach"). In *Ott* v. *State*, 600 A.2d 111 (Md.), cert. denied, 506 U.S. 904 (1992), the outdated information on which the arresting officer relied was the fault of another officer in the same sheriff's department, and the court specifically relied on that fact in declining to apply a good-faith exception. See *id.* at 118. Finally, *People* v. *Jennings*, 430 N.E.2d 1282, 1285 (N.Y. 1981), was decided before *Leon*, and failed even to consider whether the exclusionary rule admits of any good-faith exceptions.

were attached. *Id.* at 586. The Nebraska Supreme Court ordered suppression of evidence seized during an ensuring arrest, reasoning that the dispatcher "was at least * * * an adjunct to law enforcement," *id.* at 591; that the dispatcher and the officer had acted negligently in not verifying the plate number before running it, *id.* at 592; that there was no evidence that the error was "an isolated 'honest mistake' which is unlikely to recur," *ibid.*, and that "the threat of exclusion [was] likely to cause police officers and dispatchers to exercise greater care" in the future, *id.* at 593.

The considerations relied upon in *Allen* are not present here. The Dale County employee who made the error here did not work for the Coffee County Sheriff's Department, the agency that made the arrest. Given the information he had been provided, Investigator Anderson's actions in arresting petitioner were entirely reasonable. The district court specifically found that the recordkeeping system in Dale County is generally reliable, and that the error that occurred in this case does not reflect a more general problem. Pet. App. 18a. And excluding evidence in a federal prosecution that is based on an arrest made by Coffee County officers is highly unlikely to influence the future conduct of Dale County employees.

Finally, there is also no conflict between the decision below and *People* v. *Fields*, 785 P.2d 611 (Colo. 1990) (Pet. 15-16), or *People* v. *Blehm*, 983 P.2d 779 (Colo. 1999) (Pet. 16). In *Fields*, which pre-dates this Court's decision in *Evans*, the defendant was arrested based on inaccurate information contained in the NCIC database. 785 P.2d at 612. The Colorado Supreme Court ordered suppression of evidence seized during the arrest, holding that its admission could not be justified under a state

statute providing that otherwise-admissible evidence "shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer * * * as a result of a good faith mistake or a technical violation." *Id.* at 613 (quoting Colo. Rev. Stat. § 16-3-308(1) (1990)). *Fields* did not purport to rest on federal law. In any event, because both the arrest and the error leading up to it were made by Denver police officers, see *Blehm*, 983 P.2d at 796, *Fields* did not present the question of whether an error by officials in one jurisdiction may warrant suppression of evidence seized by officials of another. *Blehm*, which was decided after *Evans*, is even more off point. There, the Colorado Supreme Court applied the same state statute at issue in *Fields* to an error by a court clerk and admitted the evidence. *Ibid.*

3. Petitioner contends that certiorari is necessary because "as policing becomes ever more reliant on computerized systems, the number of illegal arrests and searches based on negligent recordkeeping is poised to multiply." Pet. 18. Petitioner cites no evidence, however, to suggest that warrantless arrests based on the type of error that occurred here is either a significant, or an increasing, problem. Petitioner likewise does not challenge the conclusion of both the court of appeals and the district court that "'there [was] no credible evidence of routine problems with disposing of recalled warrants' and updating records in Dale County." Pet. App. 12a (brackets in original) (quoting *id.* at 17a). Cf. *Evans*, 514 U.S. at 17 (O'Connor, J., concurring) (stating that it "would *not* be reasonable for the police to rely * * * on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests").

Nor would this case present an appropriate vehicle for considering the ways in which "computer technology has changed the nature of threats to citizens' privacy over the past half century," *Evans*, 514 U.S. at 22 (Stevens, J., dissenting), or the extent to which "computerization greatly amplifies an error's effect" in situations where "many agencies * * * share access to [a single] database," *id.* at 26 (Ginsburg, J., dissenting). This case does not involve a database created, maintained, or accessed by multiple law enforcement agencies. Rather, the Dale County Sheriff's Office database at issue in this case appears to have been maintained for in-office use only, as demonstrated by the fact that it was not accessible to other law enforcement agencies or the Dale County Clerk's Office. See p. 2, *supra*; see also 9/29/05 Tr. 45-48; 10/21/05 Tr. 8, 11. Dale County's decision to maintain its list of outstanding warrants on a computer did not cause, or expand the consequences of, the recordkeeping error that resulted in petitioner's arrest. The events of this case presumably would have played out precisely the same if Dale County had used notecards or a ledger to keep track of warrants. See 10/21/05 Tr. 13 (error occurred because unidentified person who returned the warrant to the Clerk's Office failed to update the database to reflect that the warrant had been recalled). "[T]he increasing use of computer technology in law enforcement" is "an evolving problem that this Court need not * * * resolve too hastily." *Evans*, 514 U.S. at 23 (Ginsburg, J., dissenting). Because the overall reliability and usefulness of large-scale law enforcement information systems is not at issue here, consideration of whether the good-faith exception should extend to situations where police rely on errone-

ous information contained in such systems should await a case where those issues can be thoroughly explored.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE
Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v

UNITED STATES,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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Florida Office of the Attorney General, AG Headnote to Slip Opinion in *Shadler v State of Florida*, http //www hsmv state fl us/ CASES/Shadler htm 3
Petitioner's Brief, *Shadler v State*, No 93-784 (Fla Jan 7, 1999), *available at* www law fsu edu/library/flsupct/sc93784/ 93784init pdf 3
Putnam County Sheriff's Office Website, About Major Gary Bowling, http //www pcso us/htdocs/bio/bowling html 3

REPLY BRIEF FOR PETITIONER

The government does not dispute the importance of the question whether the Fourth Amendment requires evidence found during a search incident to an illegal arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but incorrect information negligently provided by another law enforcement agent Nor does the government dispute that this issue arises frequently Nor does the government seriously dispute that this case is a suitable vehicle to resolve this issue

The government does not even deny that federal courts of appeals and state courts of last resort are divided over this issue Instead, the government attempts to downplay that conflict by discussing particular facts from a fraction of those lower court opinions – facts that those courts did not find relevant to the legal issue before them The government also attempts to defend the decision below Both attempts are unavailing

1 Since this Court's decision in *Arizona v Evans*, 514 U S 1 (1995), federal courts of appeals and state courts of last resort have divided five-to-four over the question whether the exclusionary rule applies when law enforcement agents' negligent errors cause illegal arrests and searches *See* Pet 7-17 The government does not seriously contest that five of those nine courts (including the Eleventh Circuit) have confronted that issue and arrived at conflicting holdings The government concedes that the Fourth Circuit "considered the issue [and] reached the same conclusion as the decision below " BIO 16 (describing *United States v Williams*, 1998 WL 276460 (4th Cir 1998)) The

government also concedes that the Fifth Circuit has concluded that "'the good faith exception to the exclusionary rule applies regardless of whether the error was by court clerks or police personnel'" BIO 15 n 2 (quoting *United States v Castaneda*, 2001 WL 1085086, at *1 (4th Cir 2001)) The government never contests (or even mentions) that the Georgia Supreme Court likewise has concluded that evidence obtained under the circumstances of this case cannot be suppressed in its courts *Harvey v State*, 469 S E 2d 176 (Ga 1996), *see* Pet 12 And the government does not dispute that those three decisions and the decision below conflict with the Arkansas Supreme Court's decision in *Hoay v State*, 71 S W 3d 573 (Ark 2002), instead tepidly suggesting that "the Arkansas court may choose to reconsider that decision in the future" BIO 21

Having conceded that a conflict exists, the government then tries to distinguish away the other state supreme court decisions that have taken the same position adopted by the Arkansas Supreme Court None of the government's purported distinctions has merit

In the Eleventh Circuit, the government acknowledged the salience of *Shadler v State*, 761 So 2d 279 (Fla), *cert denied*, 531 U S 924 (2000), and argued that the case had been decided incorrectly *See* Gvt CA11 Br 15 n 2 Now, however, the government has switched course, contending that *Shadler* poses no conflict with the Eleventh Circuit's decision here because the agency in *Shadler* that employed the clerically negligent law enforcement agent also employed the arresting officer BIO 18-19 The

government is incorrect The negligent agent and arresting officer worked in different law enforcement agencies the negligent agent worked in Florida's Department of Highway Safety and the arresting officer worked in the Putnam County Sheriff's Office *See Shadler,* 761 So 2d at 280-81 (identifying arresting officer as Deputy Gary Bowling and source of error as the Department of Highway Safety) [1] In any event, it was irrelevant to *Shadler*'s analysis whether the arresting officer was a "fellow employee" (BIO 18) of the negligent actor The Florida Supreme Court held that the exclusionary rule applied because the clerically negligent agency was "an integral part of law enforcement *in the State*" 761 So 2d at 286 (emphasis added)

The government likewise asserts that *People v Willis*, 46 P 3d 898 (Cal 2002), is distinguishable because the recordkeeping error there "was committed by the agency employing one of the two officers involved in the search" BIO 19 n 6 This statement, however, tells only part of the story, because the investigation was instigated by an officer in a different

---

[1] Additional documents related to the case confirm that Deputy Bowling worked for the Putnam County Sheriff's Office *See* Petitioner's Brief at 2, *Shadler v State*, No 93-784 (Fla Jan 7, 1999), *available at* www law fsu edu/library/flsupct/sc93784/93784init pdf (stating that arresting officer was a Deputy Sheriff for the Putnam County Sheriff's Office), Florida Office of the Attorney General, AG Headnote to Slip Opinion in *Shadler v State of Florida*, http //www hsmv state fl us/CASES/Shadler htm (describing arresting officer as "sheriff's deputy"), Putnam County Sheriff's Office Website, About Major Gary Bowling, http //www pcso us/htdocs/bio/bowling html (indicating that at the time of the arrest, then-Deputy Gary Bowling was a member of the Putnam County Sheriff's Office)

agency 46 P 3d at 900 In any event, the agency employing the person who made the clerical error (the Department of Corrections) was significant to the California Supreme Court only for the question of whether that person was an "adjunct to the law enforcement team" *Id* at 908, *see also id* at 912 Once the court concluded that Department of Corrections employees are adjuncts to the law enforcement team, the court held the exclusionary rule applied to the seized evidence because "law enforcement is collectively at fault for an inaccurate record that results in an unconstitutional search" *Id* at 915

The government's attempt to deny that the Nebraska Supreme Court's decision in *State v Allen*, 690 N W 2d 582 (Neb 2005), conflicts with the decision below (BIO 21-22) also fails The decision in *Allen* turned on two considerations (1) whether an "adjunct to law enforcement" committed the negligent error that caused the unlawful arrest (690 N W 2d at 591), and (2) whether applying the exclusionary rule in such a case "will have a significant effect" in deterring law enforcement agents' clerical negligence (*id* at 593) Contrary to the government's assertion (BIO 22), "the considerations relied upon in *Allen*" *are* present in petitioner's case First, an adjunct to the law enforcement team committed the negligent error that caused the unlawful arrest Second, petitioner's case presents the question whether the exclusionary rule would deter such negligence just as squarely as *Allen* did Nothing in the Nebraska Supreme Court's opinion suggests it mattered whether the officer who made the clerical error worked for the same agency as the officer who conducted the illegal search The differing conclusions regarding deterrence reached by the

Eleventh Circuit and Nebraska Supreme Court simply mean that the cases conflict, not that they are distinguishable *See* Pet 15

The government is also unable to explain away the conflict between the decision below and the Colorado Supreme Court's decisions in *People v Fields*, 785 P 2d 611 (Colo 1990), and *People v Blehm*, 983 P 2d 779 (Colo 1999) The government suggests that the strict dichotomy those decisions establish – and that the government here shuns – between "errors of court employees" and "police error" (*Blehm*, 983 P 2d at 796) derives from a state exclusionary statute BIO 22-23 But the Colorado Supreme Court made clear that its state statutory test is "substantially similar" to the standard recognized in *United States v Leon*, 468 U S 897 (1984) "under either test, our inquiry must be whether it was objectively reasonable for the officer to rely upon the warrant" *People v Altman*, 960 P 2d 1164, 1169 (Colo 1998) Lest there be any doubt, the Colorado Supreme Court explicitly grounded its analysis in *Blehm* in a detailed consideration of *Evans Blehm*, 983 P 2d at 795-96

Finally, the government's suggestions that the size of a particular law enforcement recordkeeping database might affect the Fourth Amendment's suppression analysis (BIO 19, 20, 24) are specious The government fails to offer any coherent rationale for why the exclusionary rule should turn on details concerning the accessibility of erroneous information (whether computerized or not) Nor could it Law enforcement is necessarily collaborative and requires many actors and agencies to move beyond county boundaries to access and utilize collective law

enforcement knowledge Therefore, regardless of whether a recordkeeping system is a national or local computerized database – or indeed, a paper ledger – inaccurate law enforcement recordkeeping cuts across jurisdictions to cause baseless arrests and unlawful seizures There is no way to confine law enforcement errors to the jurisdiction in which they originate Suppressing the evidence obtained from such illegal searches will strongly discourage inaccurate record-keeping – regardless of the scale of the database – because law enforcement agents will know that their clerical negligence could severely hamper their own cases and those of agents from sister jurisdictions with whom they regularly work in concert

2 The government is also wrong on the merits This Court's jurisprudence leaves no room for the police to profit from their own negligent errors that directly cause illegal arrests and searches Indeed, for over ninety years, this Court has enforced the exclusionary rule every time the government in a federal criminal prosecution has sought to rely on evidence that it would not have obtained but for illegal law enforcement conduct *See* Pet 21-22

The government advocates a totality-of-the-circumstances exception to this unbroken line of authority The government argues that "where, as here, (1) the error was negligent rather than deliberate, (2) the error was made by a different law enforcement agency than the one that made the arrest, and (3) the recordkeeping system is generally reliable, *the balance tips* against suppressing" the illegally seized evidence BIO 10 (emphasis added) Not only does this multi-factor analysis fail to distinguish

conflicting decisions from other courts, but it also fails, for several reasons, to withstand scrutiny on its own terms

First, this multi-factor test cannot be squared with this Court's reasoning in *Evans* At every step of its analysis in *Evans*, this Court relied on the distinction between court clerks and law enforcement agents This Court explained that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees" 514 U S at 14 The Court held that applying the exclusionary rule was unwarranted "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" *Id* at 15 In contrast to law enforcement agents, court clerks "have no stake in the outcome of particular criminal prosecutions" *Id* Nothing in this dichotomy retreats from this Court's longstanding categorical treatment of law enforcement errors as triggering the exclusionary rule

Second, suppressing evidence seized as a result of law enforcement personnel's negligent errors *will* "result in appreciable deterrence" Pet App 9a "Under [this Court's] precedents," "application of the exclusionary rule depends on the existence of a 'sufficient causal relationship' between the unlawful conduct and the discovery of evidence" *Hudson v Michigan*, 126 S Ct 2159, 2170-71 (2006) (Kennedy, J , concurring in part and concurring in the judgment) (describing *United States v Ramirez*, 523 U S 65, 72 n 3 (1998)) In the instant scenario, the "causal relationship" between unlawful law enforcement conduct and the discovery of evidence could not be

tighter But for the law enforcement error leading to the illegal search, the officers would not have obtained the evidence at issue And this is true regardless of the perceived reliability of the faulty recordkeeping system, or whether the negligent agency employs the arresting officer in all those events, law enforcement error directly causes the illegal seizure of evidence To prevent such illegal arrests and seizures, law enforcement agents need a strong incentive to maintain clerical diligence Application of the exclusionary rule is the only incentive likely to be effective *See* Pet 24-27

Third, the government's totality-of-the-circumstances test would generate costly litigation and unpredictable results Each time a defendant seeks to suppress evidence seized as a direct result of law enforcement agents' negligence, a court would have to undertake a fact-intensive and time-consuming investigation to determine whether to grant the motion to suppress In *Williams*, for example, the arresting officer came from a county that had both a police department and a sheriff's office *See United States v Williams*, 1998 WL 276460, at *1 (4th Cir 1998) Under the government's balancing test, it is unclear whether officers from those different departments of the same county would be "fellow employees" The *Willis* case illustrates, moreover, that determining the agency affiliation of just one officer can be complex the arresting officer in *Willis* was "working out of the Bakersfield Police Department as part of the Kern County Narcotics Enforcement Team" 46 P 3d at 900 The government's balancing test would require courts artificially to assign such officers to a single agency

Any multi-factor analysis becomes even messier when several agencies are involved, with each playing a slightly different role in an arrest and search In *Willis*, for example, a state parole agent, relying on inaccurate information from the California Department of Corrections, authorized a search in an investigation initiated by the city policeman, and then jointly executed the search with city police and a sheriff's detective *Id* The government's test offers no guidance on how a court should even begin its suppression analysis in such a multi-agency, multi-jurisdictional case, let alone how to apportion fault by agency Even once a court settled the question whether the arresting officer and the negligent agent worked for the same agency, it is unclear, under the government's test, how important that determination would be, in relation to any other factors relevant to the test But whatever its precise weight, that determination would be just one step in the hard slog of determining which way "the balance tips" regarding suppression BIO 10

Finally, the government's proposed rule would not only be inadministrable, it would also disregard reality Neither criminal activity nor any investigative target's criminal history is hermetically sealed by county Law enforcement is by nature a collaborative effort It brings together many different agencies, divisions, and departments from across jurisdictions, and rarely is any one agency tasked with the exclusive duty of fighting any particular crime All law enforcement records – whether computerized or not, and whether instantly accessible across jurisdictions or not – are part of the interwoven repository of information from which investigators can and must

draw on a daily basis Accordingly, the relevant inquiry when dealing with negligently provided information that causes an illegal search should be simply whether "[t]he exclusionary rule [would provide] an incentive for the law enforcement profession *as a whole* to conduct themselves in accord with the Fourth Amendment" *Illinois v Gates*, 462 U S 213, 261 n 15 (1983) (White, J , concurring in the judgment) (emphasis added)

Here, there should be no doubt that it would As at least five lower courts have held, illegally obtained evidence should be suppressed when law enforcement personnel, rather than court clerks, commit a record-keeping error that results in the unlawful seizure of evidence This simple test comports with law enforcement realities and this Court's precedents This Court should make clear that the Eleventh Circuit should not have shirked from applying it here

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

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January 30, 2008

JOINT APPENDIX

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(6)

Supreme Court, U.S.
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No. 07-513

IN THE

Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA (DOTHAN)

Criminal Docket for Case #:1-05-cr-00161-MHT-CSC-1

Date	Docket No.	Proceeding
06/29/2005	3	INDICTMENT as to Bennie Dean Herring(1) count(s) 1, 2. (jct,) (Entered: 06/30/2005)
09/25/2005	16	MOTION to Suppress by Bennie Dean Herring. (Freeman, Christine) (Entered: 09/25/2005)
09/27/2005	20	ORDER as to Bennie Dean Herring re 16 MOTION to Suppress filed by Bennie Dean Herring directing the government to file its Response by

		noon on 9/29/2005, and setting an Evidentiary Hearing for 9/29/2005 03:00 PM in Courtroom 4B before Honorable Charles S. Coody. Signed by Judge Charles S. Coody on 9/27/05. (snc) (Entered: 09/27/2005)
09/28/2005	23	RESPONSE to Motion by USA as to Bennie Dean Herring re 16 MOTION to Suppress (Speirs, Verne) (Entered: 09/28/2005)
09/29/2005	24	Minute Entry for proceedings held before Judge Charles S. Coody :Motion

		Hearing as to Bennie Dean Herring held on 9/29/2005 re 16 MOTION to Suppress filed by Bennie Dean Herring. (Court Reporter Mitchell Reisner) (Attachments: # 1 Witness List) (ws) (Entered: 10/03/2005)
10/03/2005	25	REPORT AND RECOMMEND-ATION as to Bennie Dean Herring re 16 MOTION to Suppress; Objections to R&R due by 10/7/2005. Signed by Judge Charles S. Coody on 10/3/05. (snc) (Entered: 10/03/2005)
10/05/2005		TRANSCRIPT of

		SUPPRESSION HEARING as to Bennie Dean Herring held on September 29, 2005 before Judge Charles S. Coody. Court Reporter: Mitchell Reisner. (1 volume) (snc) (Entered: 10/06/2005)
10/07/2005	29	OBJECTION TO REPORT AND RECOMMEND-ATIONS 25 by Bennie Dean Herring (Freeman, Christine) (Entered: 10/07/2005)
10/07/2005	30	Pro Se OBJECTION TO REPORT AND RECOMMEND-ATIONS 25, 22 by Bennie Dean Herring (snc) (Entered: 10/11/2005)

10/11/2005	31	Pro Se OBJECTION TO REPORT AND RECOMMEND-ATION 25 by Bennie Dean Herring (snc) (Entered: 10/11/2005)
10/13/2005	38	ORDER as to Bennie Dean Herring re 16 MOTION to Suppress filed by Bennie Dean Herring as to "physical evidence"; A Supplemental Hearing is set for 10/24/2005 at 01:30 PM in Courtroom 2E before Honorable Myron H. Thompson. The parties are to file Supplemental Briefs by 1:00 p.m. on

		10/21/2005 . Signed by Judge Myron H. Thompson on 10/13/05. (ws) (Entered: 10/13/2005)
10/13/2005	39	ORDER as to Bennie Dean Herring re 16 MOTION to Suppress filed by Bennie Dean Herring ; ORDER ADOPTING REPORT AND RECOMMEND-ATIONS of the United States Magistrate Judge 25 REPORT AND RECOMMEND-ATIONS as to Bennie Dean Herring GRANTING 16 MOTION to Suppress as to "statements." Signed by Judge Myron H.

		Thompson on 10/13/05. (ws) (Entered: 10/13/2005)
10/20/2005	57	BRIEF/ RESPONSE in Support by Bennie Dean Herring re 16 MOTION to Suppress (Freeman, Christine) (Entered: 10/20/2005)
10/21/2005	61	Minute Entry for MOTION HEARING held before Judge Myron H. Thompson on 10/21/2005 re 16 MOTION to Suppress filed by Bennie Dean Herring, 49 MOTION to Dismiss filed by Bennie Dean Herring, 56 MOTION in Limine filed by Bennie Dean

		Herring,, 46 MOTION in Limine *to Prevent Testimony Regarding Kacy Clark* filed by USA (Court Reporter Mitchell Reisner.) (Attachments: # 1 Witness List# 2 Government's Exhibit List# 3 Defendant's Exhibit List) (snc) (Entered: 10/21/2005)
10/24/2005	63	ORDER ADOPTING REPORT AND RECOMMEND-ATIONS as to Bennie Dean Herring (1) overruling Herring's objections 29, 30, and 31; (2) adopting the Magistrate Judge's recommend-

		ation 25 as to "physical evidence" and (3) denying 16 MOTION to Suppress filed by Bennie Dean Herring. An opinion will follow later. Signed by Judge Myron H. Thompson on 10/24/05. (snc) (Entered: 10/24/2005)
10/26/2005	74	MEMORAN-DUM OPINION re 63 order adopting Magistrate Judge's 25 recommendatio n to deny defendant's 16 motion to suppress "physical evidence" as to Bennie Dean Herring . Signed by Judge Myron H. Thompson on 10/26/05. (snc)

		(Entered: 10/26/2005)
11/07/2005		JURY TRIAL commenced before Judge Myron H. Thompson as to Bennie Dean Herring on 11/7/2005 (see final entry for pdf) (Court Reporter Mitchell Reisner.) (snc) (Entered: 11/08/2005)
11/08/2005	84	JURY VERDICT of Guilty on Counts 1 and 2 as to Bennie Dean Herring (1) (snc) (Entered: 11/08/2005)
01/27/2006	111	JUDGMENT as to Bennie Dean Herring (1). Count 1: 27 Mos Imp; 3 Yrs Sup Rel; $100 SA. Count 2: 12

		Mos Imp (conc w/Ct 1); 1 Yr Sup Rel (conc w/Ct 1); $25 SA . Signed by Judge Myron H. Thompson on 1/27/06. (snc) (Entered: 01/27/2006)
01/27/2006	112	NOTICE OF APPEAL by Bennie Dean Herring to the United States Court of Appeals for the Eleventh Circuit from 111 Judgment, entered 1/27/06. Copies mailed. (ydw,) (Entered: 01/27/2006)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 06-10795-FF
USA v. Bennie Dean Herring

File Date	Entry
01/31/2006	DKT2 (Docketing Notice) issued. To:Herring, Bennie Dean; c:Debra P. Hackett; c:Leura Garrett Canary; c:Verne H. Speirs
02/01/2006	Probable Jurisdiction Noted: (ProSe)
04/17/2006	Attorney Ronald W. Wise has been appointed to represent appellant Bennie Dean Herring. JFD
07/17/2006	Appellant Brief Filed: (Atty: Ronald W. Wise)
08/21/2006	Appellee Brief Filed: (Atty: Verne H. Speirs)
09/01/2006	Reply Brief Filed: (Atty: Ronald W. Wise)
02/05/2007	Ronald W. Wise argued for Appellant; Verne H. Speirs argued for Appellee
07/17/2007	Judgment Entered
07/17/2007	Opinion Issued
10/22/2007	Notice of Filing Certiorari: 07-513 (Atty: Jeffrey L. Fisher)
02/25/2008	Certiorari Granted: SC# 07-513 (Atty: Ronald W. Wise)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

THE UNITED STATES OF AMERICA

v. CRIMINAL ACTION NO.

BENNIE DEAN HERRING 1:05-CR-161

MOTION TO SUPPRESS PROCEEDINGS

BEFORE: The Hon. Charles S. Coody
HEARD AT: Montgomery, Alabama
HEARD ON: September 29, 2005

APPEARANCES: Verne Speirs, Esq.
Defendant Herring (pro se)
Christine Freeman, Esq.

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[DIRECT EXAMINATION BY MR. SPEIERS OF MARK ANDERSON]

* * * * *

Would you please state your full name for the record?

A Market Robert Anderson.

Q And, sir, how are you employed?

A I'm presently the captain of police in Florala, Alabama.

Q And, sir, before that where were you employed?

A Prior to that I was with—employed with the Coffee County Sheriff's Department assigned to the violent crimes narcotics task force.

* * * * *

[Page 6, line 2, to page 16, line 4]

Q How long have you been policing, if you will?
A Sixteen years.

Q Have you already post certified?

A Yes.

Q Have you been to various law enforcement schools?

A Yes, sir, many of them.

Q Okay. Can you name a few that you have been through?

A I've been to the D. E. A. schools on narcotics, Drug Interdiction, Criminal Investigation One, Two and Three. I'm certified as a criminal and narcotics investigator. I've had Interview and Interrogation, Weapons of Mass Destruction. I've had many, many other courses over the years.

Q Sir, just as a point of clarification, have you ever worked for Dale County, Alabama?

A No, sir.

Q Or the Dale County Sheriff's Office?

A No, sir.

Q The Dale County Police Department?

A No, sir.

Q Or how about have you ever worked for the Dale County Circuit Clerk's Office?

A No, sir.

Q Okay. Sir, along that same line are you familiar at all with how the Dale County warrant system works?

A No, sir.

Q In your time in Coffee County or in your sixteen years of being in law enforcement, have you ever had any reason to question a Dale County warrant?

A No, sir, I haven't.

Q Let's go back to July 7, 2004, okay?

A Yes, sir.

Q Do you remember that date?

A Yes, sir, I do.

Q Okay, sir. Do you know Bennie Dean Herring?

A Yes, sir, I do.

Q Is Mr. Herring in the courtroom today?

A Yes, sir, he is.

Q Would you point him out, sir.

A It would be him right here.

(Whereupon, the witness indicated.)

Q Sir, if you could, could you detail to the Court the events that took place on July 7, 2004 with regard to Mr. Herring?

A Yes, sir. I had came into work that afternoon. When I came into the Sheriff's Department, Investigator Reynolds told me that Bennie Herring was there and was out back of the department with the sheriff getting something out of his truck, or a truck that belonged to him. I don't know much about that truck but I understand it's his truck. There was something in it and the sheriff had let him get it out anyway.

Q Let me stop you there. Was the vehicle left there by Mr. Herring? Do you have any knowledge of why the vehicle was there?

A The only thing I know the chief deputy at the time had had it brought back there. I don't know if somebody drove it or -- but it was just in our impound lot and it was his truck.

Q Okay. So it was impounded?

A Yes.

Q Okay. I understand. Please continue.

A The sheriff had went out into the impound lot with Herring, and he -- whatever he was going to get he was going to get anyway, I don't know, but as soon as they told me he was there I had walked up back up

front to the Sheriff's Department where Sandy Pope was, she's the warrant clerk, she handles all the warrants from not just our county but any warrants that are sent to our county.

I had been told from a Dale County investigator, Tim Hicks, that there were warrants for Herring. I asked Sandy at that point if we had any warrants on him. She checked and said that we did and I asked her to call Dale County.

Q Let me stop you there and let's go through it bit by bit. What is the first thing you asked her to check on?

A Warrants from Coffee County.

Q Okay. And did she do that?

A Yes, she did.

Q Do you know how she did that?

A On her computer. She sits there at her desk, the computer is in front of her, she just types in the name. You know, if there is an active warrant it will bring it up.

Q And where were you as she was looking at this?

A I was standing at the front counter.

Q Okay. And what was the result of a search for Coffee County warrants?

A There were none.

Q All right. So what happened next?

A I asked her to call Dale County.

Q Okay. And did she do that?

A Yes, she did.

Q And where were you when she called to Dale County?

A I was still standing up front with deputy Bradley was standing beside me.

Q And what happened next?

A She was still on the phone. She looked over at me and said, "Yeah, they have got warrants on him, felony warrants." So Deputy Bradley and I entered his car. I saw Herring getting in his truck, driving up out of the parking lot of the Sheriff's Department. We got in his patrol unit, went up the road behind him. He had already made it from our driveway to and turned right.

Q Let me stop you there. From the time you learned that there was an active warrant from Dale County until the time you got behind Mr. Herring, what's the amount of time that lapsed between your knowledge of the warrant and getting behind Mr. Herring?

A From the time that Sandy said, "Yes, they have a warrant on him," until we got behind him, probably

two minutes, I mean because she was still on the phone saying, "Yeah, they have a warrant on him" and we were going out the door.

As we were chasing up to him, I called back on the radio out of the car and asked her if Dale County wanted him, would they come pick him up and she told me, "Yes." At this time she [sic] turned right on 84, Deputy Bradley turned the emergency lights on the vehicle to stop him.

Q Okay. So now Mr. Herring is stopped. All right. What did you do next?

A As we come out of the car Herring come out of his truck, was walking back toward us.

Q Let me stop you there. Did you ask him to exit his vehicle?

A No, sir.

Q Continue, please.

A As he was coming back toward us, Deputy Bradley told him he was under arrest. And he said, "Under arrest for what?"

He said, "There is a warrant on you in Dale County."

Well he turned and started back toward his truck. I was in between his car and his truck, standing in front of him and stopped him. Deputy Bradley took him by the arm in order to put the cuffs on him and he tried to pull away from Deputy Bradley and at this

point we used a little more restraint to put the cuffs on him.

Once he was cuffed, I started patting him down to search him, made sure he didn't have any weapons or anything like that on him. In his left front pocket I pulled out a small bag that had powder -- I'm sorry.

Q You pulled out a small bag?

A Right that had powder residue in it. As I pulled it out Mr. Herring looked at it and made a spontaneous statement, "That's not mine, I don't know what that is."

MR. SPEIRS: Your Honor, may I approach?

THE COURT: You may.

Q Sir, I show you what's been marked for identification as government's exhibit 2. Do you recognize that exhibit, sir?

A Yes, sir. This is what I removed from Herring's pocket.

Q And, if you will, was -- as you were patting him down, was he cuffed at this point?

A Yes, he was cuffed. He was under arrest, yes.

Q All right. And you removed that from which pocket, sir?

A His left front.

Q Left front pocket. All right.

Do you know whether any analysis has been done on that particular substance?

A Yes, sir, it has.

Q All right. Do you know what the result of that analysis, is?

A Yes, sir, it was positive for methamphetamine.

Q All right, sir. Now continuing on, what was the next thing that happened?

A He was -- Herring was put in the back of the patrol unit. At this time Deputy Bradley and I approached his truck. I was on the passenger's side, Deputy Bradley I think was on the driver's side just to search incident to the arrest.

Deputy Bradley had pulled some stuff that was up under the edge of the sheet that was just laying there. He pulled it out. As he pulled it out, a black -- I think it was black -- but it was a plastic bag, anyway it was shaped like a handgun. I picked it up and unrolled it and that handgun there was inside wrapped up in there.

MR. SPEIRS: May I approach again, Your Honor?

THE COURT: You may.

Q Sir, I show you what's been marked as government's exhibit 1. Do you recognize that particular exhibit?

A Yes, sir. This is the weapon I removed from his truck.

Q And if you would, would you describe for the Court exactly where it was and how you found it?

A It was -- The transmission hump in between the passenger's side and the driver's side, it was laying kind of on top of the hump in between the seats. As he pulled things out it kind of pulled out with it.

Q Okay. Do you know whether there was any ammunition in that particular firearm?

A No, sir. My recollection is there wasn't any.

Q There was no ammunition?

A No, sir.

MR. SPEIRS: May I approach again, Your Honor?

THE COURT: You may.

Q Sir, I show you what's been marked for identification as government's exhibit 3. Do you recognize that?

A Yes, sir. This is the Lego Classic, but it's a little red bucket that was sitting in the seat.

Q What was in the Lego bucket?

A Ammunition and a knife.

Q Now is there any ammunition in that bucket right now?

A No, sir. Just two twenty-two rifle boxes, but there is no ammo in it, no.

Q All right. Sir, I'm going to show you what's been marked for identification as government's exhibit 4. Would you take a look at what's in that A.T.F. bag.

A Yes, sir.

Q Do you recognize government's exhibit 4, the contents of that?

A Yes, sir, this is ammo that was in that box.

Q And all of this ammunition was found where, sir?

A In the seat.

Q All right.

A Sitting in the seat. It was in this box, in this bucket, but it was sitting in the seat of the truck.

Q Okay. So the ammunition that was found in his car was in this bucket, and the bucket was there in Mr. Herring's vehicle?

A Yes.

Q All right. Sir, from the time that you stopped Mr. Herring until the time you secured the evidence, how much time had elapsed?

A It was less than ten minutes. I mean, we were moving pretty quick. It was just an arrest and getting through with it.

Q If you would, could you describe for the Court exactly how far Mr. Herring was stopped from the Sheriff's Department?

A It's probably two hundred feet, three hundred yards, something like that.

Q It's not even a mile?

A No.

* * * * *

[Page 17, line 11, to page 21, line 4]

Q Okay. Sir, if you would, could you describe for the Court from the moment you heard that there was an active Dale County warrant on Bennie Dean Herring until you had him secured and recovered the evidence in this case, approximately how much time had elapsed?

A Less than ten minutes. Probably seven, eight, nine. It's under ten minutes. I mean it was just -- he was just right there.

Q It was under ten minutes?

A Yes, sir.

Q Now, at some point in time -- or when did you learn that there was an issue with the Dale County warrant?

A This was after he was in the back of the car. Lieutenant Davis had driven up where we were when we were stopped. And at one point he was standing outside his car at the back door of the patrol unit where Herring was. And I don't know if he was talking to him, but at one point the door was open, you know.

But after that, when we were searching his truck, me and Deputy Bradley, when I walked back there I had heard Sandy call over the radio that she needed one of us. When I say "one of us," that would be Lieutenant Davis or Deputy Neil or I would call her on the link radio. Davis had went back to his car, was setting in his car and called her back. At that point, you know, I come walking back to his car and he had the window down and told me that there was a problem.

Q A problem with the warrant?

A Yes.

Q But what had you found by the time you learned there was a problem with the warrant?

A I would have had the weapon and the meth. He was already arrested before when he had this, before that ever come up.

Q During the course of your career with Coffee County, how many times had you relied on

information received from Dale County regarding warrants?

A I have before. You know, we all have. I mean, you know, it's just I don't know how many times. It's just something that we do.

Q In you could, geographically where is Dale County in relation to Coffee County?

A It's right there. We connect. Coffee County runs into Dale County.

Q How many times have you had a reason to question a Dale County warrant?

A None.

Q How many times have you had a reason to question information that came out of Dale County?

A None.

MR. SPEIRS: I think that's all I have for this witness, Your Honor.

THE COURT: Mr. Herring?

DEFENDANT HERRING: I'm handicapped, Judge.

[CROSS EXAMINATION BY MR. HERRING OF MARK ANDERSON]

Q Did you get your information from the Clerk's Office?

THE COURT: Mr. Herring, stand during examination.

DEFENDANT HERRING: Yes, sir. Sorry.

Q Did you get your information from the Clerk's Office from Dale County or the Sheriff's Department?

A I got mine from Sandy. She was on the phone with whoever she calls to verify the warrants.

Q Do you agree that he arrested me on outstanding warrants from Dale County?

A Yes.

Q Have you read Deputy Bradley's, I guess, it's an affidavit, statement, that's in the file?

A I'm sure I have.

Q And what you're saying is that you made a, I think you said in another hearing, we had a good faith -- Why did you all of a sudden want to know if there were any warrants on Bennie Herring? I was already in the police station, right?

THE COURT: Do what, now?

Q I was already at the Sheriff's Office. Why all of a sudden were you concerned whether there were any warrants out for Bennie Herring?

MR. SPEIERS: Your Honor, we'd object to any relevance as to why he thought there was any. He checked.

THE COURT: Overruled.

A Tim Hicks with the task force out of Dale County had told me there was a warrant for you.

Q When did he tell you that?

A I don't remember exactly when it was.

Q Well was it before that day?

A Yeah.

Q Had you acted on it earlier? Had you verified it earlier before that day?

A No, I didn't.

* * * * *

[Page 23, line 7, to page 24, line 23]

Q You do agree that there were no warrants from Dale County?

A Now? Yeah, I know that now.

Q You found out that day that there were no warrants from Dale County?

A Yeah, after you were arrested, yeah.

Q Okay. Well, you found out that day at the site, at the arrest site, at the scene where you stopped me, you found out there were not warrants from Dale County. You knew that, didn't you?

A I knew there was a problem, and that's what the lieutenant told me, "There's a problem with the warrants, let's go to the Sheriff's Office." And we went to the Sheriff's Office. You were already under arrest.

Q What would the problem with the warrants be?

A They couldn't get a the [sic] hard copy.

Q Couldn't get a hard copy.

A Yes.

Q Are you saying there was a copy –

A No, I said they couldn't put their hands on the hard copy, is what I was told.

Q Are you saying that there wasn't a hard copy?

A No. I'm saying they are saying that they could not put their hands on a hard copy. Whether or not there was a hard copy, I do not know.

Q Who told you that, that they couldn't get their hand on a hard copy?

A Lieutenant Davis.

Q Lieutenant Davis told you he couldn't get a hard copy? That means that there might just be some type of error?

A Error? There obviously was an error.

Q Did you ever find out that there wasn't a warrant?

A Yeah.

Q You did find that out?

A Yeah.

Q At what point in time did you find that out?

A When we got back down to the Sheriff's Office.

Q The Sheriff's Office?

A Yeah.

* * * * *

[Page 35, line 21, to page 37, line 16]

[DIRECT EXAMINATION BY MR. SPEIRS OF SANDY POPE]

Q Good afternoon, ma'am.

A Good afternoon.

Q Would you please state your name for the record.

A Sandy Flowers Pope.

Q And, ma'am, how are you employed?

A I work for the Coffee County Sheriff's Department.

Q Okay. And what do you do for the Coffee County Sheriff's Department?

A I am a warrant clerk.

Q And what exactly are the duties of a warrant clerk?

A I take all the warrants that are received into our office, put them on the computer and give it out to the deputy who needs it. And then once they have been served, I take them off the computer and return them to either the Clerk's Office or the agency.

Q How long have you had this particular job?

A Five years.

Q All right. And make sure I understand, you work for Coffee County, is that right?

A Yes, sir.

Q Do you have much interaction with the folks from Dale County?

A Yes, sir.

Q Okay. Who do you work with, or who do you know that has your job over in Dale County?

A Sharon Morgan.

Q Sharon Morgan. Okay. All right. Now in the five years that you have been with Coffee County, how many times have you ever had a reason to doubt information that came from Dale County, Alabama?

A Never.

Q Are you familiar with their internal warrant systems?

A No, I am not.

Q Do you know about any problems that they have with their warrant system?

A No, I do not.

* * * * *

[Page 38, line 7, to page 41, line 11]

Q What happened with regard to Bennie Dean Herring and any warrants that you became aware of that day?

A When Mr. Herring was leaving the office, Mark Anderson came and asked me if we had any outstanding warrants on him. And I checked my computer and we did not have anything. So he asked me to contact Dale County to see if they had anything active.

Q Okay. Let's stop you there. How did you check your computer system?

A I just keyed their name in and see if anything pops up that a warrant has not been served yet.

Q Okay. And how do you check with Dale County as to whether there would be any warrants?

A I contact Sharon Morgan and ask her about her warrants.

Q Okay. And we're going to go in baby steps, okay?

A Okay.

Q All right. So you contacted Sharon Morgan, is that right?

A That's correct.

Q And what did you ask her?

A I asked her if they had any active warrants on Bennie Herring.

Q Okay. And what did you learn?

A She said that they did have an F. T. A. warrant on him on a felony charge.

Q "F .T. A.," what does that mean?

A Failure to appear.

Q All right. What did you do with that information?

A I asked her to fax a copy of that warrant to me, and I relayed the information to Investigator Mark Anderson that they did have a warrant.

Q Okay. When you relayed that information to Mark Anderson, what did he do?

A He immediately left the office to try to go stop Mr. Herring to place him under arrest for that warrant.

Q Okay. All right. Did you receive at any time calls back from Investigator Anderson after he left your office?

A He did not call me.

Q Okay.

A That I remember.

Q Okay. What happened next with regard to the warrant?

A I heard on the radio, they called, that they were signal ten-fifteen which meant they had Mr. Herring in custody, and –
Q Let me stop you there. How long after Investigator Anderson left did you hear the ten-fifteen code?

A Probably five to seven minutes. I'm not real sure on the time.

Q About five to seven minutes?

A Something like that

Q At that five to seven minute mark, what was your understanding of the Dale County warrant?

A That it was active.

Q When did you become aware that there might be a problem with the Dale County warrant?

A After I heard them call "ten-fifteen" on the radio, probably three or four minutes later Sharon called back and said that the -- she could not confirm the warrant. She first said she couldn't confirm it, and then she stated that the warrant had been recalled and she had not been notified of it.

Q Okay. And what, if anything, did you do with that information?

A I contacted them on what I call the big radio and asked one of them to contact me by link. Lieutenant Davis contacted me by link, and then I explained to him that the warrant had been recalled.

THE COURT: Why did you call Lieutenant Davis instead of Anderson?

THE WITNESS: I just asked any of them that was out with that unit to contact me.

THE COURT: All right.

THE WITNESS: So that I wouldn't have to put the information out on the air.

* * * * *

[Page 43, lines 3 to 18]

Q And you did say that Anderson was still in the jail facility when you told him about the—

A No, he was at the Sheriff's Department.

Q Okay, I'm sorry. Yeah, that's correct, yeah. He was in the Sheriff's Office which is part of the jail facility when you told him about the purported warrants?

A That's correct.

Q Okay. And he left immediately, is that correct?

A That's correct.

Q Okay. And he from that point in time until Ms. Morgan, I believe it was, called you back was how long?

A Somewhere between ten minutes maybe. Ten, fifteen minutes, the total thing I guess. I'm not real sure of that as a time frame.

* * * * *

[Page 45, line 8, to page 50, line 8]

[DIRECT EXAMINATION BY MR. SPEIRS OF SHARON MORGAN]

Q Ma'am, you have been sworn?

A Yes.

Q Yes, ma'am. Okay. Would you please state your full name for the record.

A Sharon Morgan.

Q And, ma'am, where are you from?

A Ozark, Alabama.

Q Okay. And do you work for Dale County?

A Yes, I do.

Q Q Ma'am, what do you do for Dale County?

A I'm a warrant clerk.

Q Okay. And what exactly does a warrant clerk do?

A I log in my computer all warrants coming into our office from the Circuit Clerk's Office, from the D.A.'s office, from other counties. And then they're assigned to a deputy, and then whenever that warrant has been processed the deputy has maybe failed to make contact with the individual, can't locate him, then I disburse them, you know, send it back to the county or file them.

When they're arrested I do that, and I remove, you know, delete that warrant from our system or make it inactive. It's not deleted, but it's inactive.

Q Yes, ma' am. If I understand correctly, do you work for the Sheriff's Department -- or Dale County Sheriff's Department or do you work for the Dale County Clerk's Office?

A I work for the Dale County Sheriff's Office.

Q The Sheriff's Office.

A Yes.

Q Okay. Now, you work on a computer system, is that right?

A Yes.

Q Can you describe for the Court the computer system that you have vis-a-vis the computer system that the Clerk's Office has? Are they the same system?

A No. We have our own system.

Q You have your own system?

A Yes.

Q All right. Can you tell the Court just a little bit about your system and information that perhaps might transfer from the Clerk's Office to your office.

A It doesn't transfer per computer.

Q It doesn't transfer –

A Paper.

Q It comes via paper?

A Yes.

Q Okay. All right. Now do you remember July 7th of 2004?

A Yes.

Q Okay. Do you remember -- Who is Sandy Pope?

A She works in the Coffee County Sheriff's Office.

Q Okay. And how do you know Sandy?

A She and I deal over the phone back and forth many times concerning individuals and warrants.

Q Were you called on July 7th of 2004 by Sandy Pope?

A Yes, I was.

Q And what did she ask you?

A She asked me if we had an active warrant on Bennie Herring.

Q And what did you tell her?

A I told her, "Yes."

Q And how did you know that?

A Because I looked him up in my computer base and it showed an active warrant

Q Okay. And what was the warrant for?

A It was for failure to appear for possession, receiving controlled substance and also obstruction of Government operations.

Q And what did Miss Pope want you to do?

A She wanted me to fax her a copy of that warrant.

Q Okay. And what did you do?

A I went in search of the warrant to try to locate it so that indeed I could do that.

Q How did you do that? How did you physically go and search for it?

A Well, I mean there are two or three different places in the office that warrants like that are kept, because it had been returned from Coffee County. And so I went and I could not locate it at first, so I called the Clerk's Office to verify the status of it and to see if I could get a copy of it so indeed I could fax it to Sandy. And at that point in time they told me that the warrant had been recalled.

Q Okay. From the time that Miss Pope asked you or called you about a warrant until the time you found out that the warrant had been recalled, approximately how much time had elapsed?

A Ten, fifteen minutes.

Q Ten or fifteen minutes?

A Mm-hmm.

Q All right. Okay. So when did you communicate with Miss Pope that there was a problem with the warrant?

A Immediately. As soon as I found out I called her which, again, was within ten or fifteen minutes.

Q All right. Ma'am, how many times have you had or has Dale County had problems, any problems with communicated about warrants?

A Several times.

Q Are you aware of any reason why individuals in Coffee County shouldn't rely on information that they get from Dale County?

A No. I mean, they should be able to rely on what I tell them.

Q Indeed, do Coffee County authorities rely on information they get from Dale County authorities?

A Yes.

Q How often do you communicate with the folks of Coffee County about warrants?

A I have no way to answer that. It's not daily, you know. I mean, a week or two may go by and we don't call, and then the next week we may have ten conversations.

Q Certainly. So you have numerous conversations with Miss Pope during the course of your duties.

A Yes, I do.

Q All right. If I understand your testimony correctly, the Clerk's Office and the Sheriff's Department do not share a common warrant database.

A That's correct.

* * * * *

[Page 51, lines 5-9]

[CROSS EXAMINATION BY MR. HERRING OF SHARON MORGAN]

Q And like Mr. Speirs asked you, you have nothing to do with the Clerk's Office?

A Our systems do not overlap, no.

Q Your computer is separate?

A Exactly.

* * * * *

[Page 51, line 23 to page 53, line 12]

[DIRECT EXAMINATION BY MR. SPEIRS OF MARY BLUDSWORTH]

Q Good afternoon, ma'am.

A Hi.

Q Would you please state your full name for the record.

A Mary Bludsworth.

Q Could you spell your last name just for the court reporter?

A B-l-u-d-s-w-o-r-t-h.

Q Ma'am, how are you employed?

A I'm the Dale County Circuit Clerk.

Q How long have you been the Dale County Circuit Clerk?

A Eleven years.

Q And if you would, could you just briefly describe for the Court what the duties of a county circuit clerk are.

A To maintain all court records, basically. All pleadings and everything that's involved in a court file.

Q Yes, ma'am. Okay. Do you recall July 7th of 20 2004?

A Do I recall that day? Yes.

Q Okay. All right. Before I ask you that, let me ask you this. Do you work in the same building as the Sheriff's Department?

A I do.

Q Okay. What floor are you on?

A Third.

Q And what floor is the Sheriff's Department on?

A The basement.

Q What -- Do the Sheriff's Department and the Circuit Clerk's Office share a computer network?

A No.

Q So there is no direct sharing of information between the two entities?

A No. Ours is the court system and theirs is the county system.

* * * * *

[Page 53, line 20, to page 55, line 7]

Q Are you aware of the status of Mr. Herring's warrant as it stood on July 7, 2004?

A Yes.

Q And what was the status of the warrant?

A Recalled.

Q Okay. What certainty do you have that the Sheriff's Department knew that that warrant had been recalled?

A None.

Q Ma'am, what reasons are you aware of that individuals in Coffee County, Alabama should have not to rely on Dale County information?

A None.

Q Should they be able to rely on Dale County information?

A As far as I know we've never had any problems.

Q Do you know Investigator Mark Anderson?

A I do not.

Q Do you know Neil Bradley?

A I do not.

Q Okay. All right. Have you ever -- Do you work with them at all?

A No.

Q You don't have any knowledge of them whatsoever?

A None.

Q Okay. Thank you, ma'am.

THE COURT: Mr. Herring?

[CROSS EXAMINATION BY MR. HERRING OF MARY BLUDSWORTH]

Q Would it be safe to say that your system does work, since there was no copy of the recalled warrant in the Sheriff's Office?

A I can't tell you what's in the Sheriff's Office.

Q Would you agree with me that your system does work, your Clerk's Office does work since there wasn't a copy, the warrant was recalled physically? That's not a fair question.

A As far as I know the system that we have works.

* * * * *

[Page 56, lines 11-12]

DEFENDANT HERRING: Judge, I'd like to call Neil Bradley.

* * * * *

[Page 58, line 17, to page 62, line 8]

Q Would you just tell us exactly your recollection of what happened that day.

A Best of my memory, you were at the office to retrieve an item out of a truck that was in impound. You came back to the office. Someone said you had a felony warrant out of Dale County.

At that time myself and Mark Anderson left the office, went back through the office, went and got in my patrol car and at that time you were driving up the hill. Once you made a turn right onto Highway 84 in the westbound lane, I activated my lights. I stopped you on a traffic stop.

Once we -- both vehicles were stopped, you exited your vehicle and started to walk towards the patrol car. Once you started walking towards the patrol car I told you to place your hands on the car. You refused to do so and you kept asking, "Why? What have I done?" And I told you at that time Dale County had a felony warrant for your arrest.

At that time you turned and walked back toward the driver's side door of your truck, and at that time I grabbed ahold of your arms and we placed you in handcuffs. Investigator Mark Anderson patted you down, checked your pockets and out of one of your pockets he pulled out a plastic baggy, a Ziploc baggy

that contained an off-white powdery substance in it. We placed you in the back of the car.

Search incident to the arrest was done on the vehicle. I remember a red bucket, a red Lego bucket that had been found that had various types of ammunition. I remember a shotgun shell in particular and a gun was found in the truck. While the search was going on, at some point myself and Investigator Mark Anderson were searching the truck. Warrant clerk Sandy Pope called on the V. H. F. radio and stated that someone needed to call her on the link. At that time I did not have my link with me, all I had was a hand-held walkie-talkie.

It is my understanding at that time Chris Davis called her on the link, and she advised him that there might be some problems in confirming the warrant.

THE COURT: All right. At that point, tell me what you had found, if anything, during the search.

THE WITNESS: At that time all I had seen was a red Lego bucket with the ammunition in it.

THE COURT: But you saw the ammunition?

THE WITNESS: I saw the ammunition inside the bucket. I saw the baggy that come out of his pocket and the gun had been removed from under the seat.

THE COURT: Already?

THE WITNESS: Already, before we learned there might be a problem confirming the warrant.

Q Do you remember me asking you for a copy of the warrant?

A Yes, sir, I do remember you asking me that.

Q I asked you several times, didn't I?

A Yes, sir. And I told you that I was not the one that arrested you, I told that you Mark Anderson arrested you.

Q Do you remember that after you told me that -- that's correct. Do you remember what I did after -- Do you remember what -- do you remember --Let me say it this way. Do you agree that after I asked you for the warrant and you told me you didn't have one, that's when I walked back toward my truck?

A I can't remember. I don't remember you asking to see the warrant at that time.

Q When did I ask you to see the warrant?

A I remember you asking several times after you were placed under arrest and taken to the jail. I remember that specifically.

Q All right. All right. From the time you left the jail until Sandy Pope called, how long would that be?

A You're talking about from the time I left –
Q The second time that Sandy Pope called and said they were having problems confirming the warrant, how long would that be?

A I don't know. Sandy Pope did not call me on the link, she called over the V. H. F. radio. I would guess probably ten minutes from the time that we left the office to the time we had -- you know, we made the traffic stop during that time, probably ten minutes had passed. But I did not talk directly to Sandy Pope, that was Lieutenant Chris Davis that talked directly to her.

Q So from the information from Dale County as to the existence of a warrant and the non-existence of the warrant would have been a span of ten minutes?

A That would be correct.

* * * * *

[Page 66, line 8 to page 67, line 14]

MR. SPEIRS: Your Honor, if I might? From what I can discern from the motion, he is also attacking some statements that were made. And the Government concedes that when he was arrested Miranda was not given after he was put into custodial – or put into custody, Your Honor. So except for impeachment purposes, the Government will not seek to introduce those statements at trial except for impeachment.

THE COURT: All right. Now what's your argument about the physical evidence that was seized during the search of the truck and from you?

DEFENDANT HERRING: Well the only argument I've got is the arrest. There was no warrant from Dale County. They knew there wasn't a warrant. I

asked for a copy specifically. The lady in Dale County had been asked to fax them a copy of – the hard copy if there was one. And I wasn't going anywhere. I was outside my truck. I was walking away from the truck which means they would need the search warrant for the truck.

If there were any evidence in the way of weapons or methamphetamine, if there were any it should be suppressed. You can't -- The Supreme Court allowed this where the clerks -- where the police officer gets his information from a clerk, from a circuit clerk, they have allowed that at times. They have never allowed it where or never decided a case where it was between police agencies. In fact, they have always suppressed evidence that was erroneously gathered from one enforcement agency to the other because it's convenient.

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

THE UNITED STATES OF AMERICA

v. CRIMINAL ACTION NO.

BENNIE DEAN HERRING 1:05-CR-161

SUPPLEMENTAL HEARING ON MOTION TO SUPPRESS PROCEEDINGS

* * * * * * * * * *

BEFORE: The Hon. Myron H. Thompson
HEARD AT: Montgomery, Alabama
HEARD ON: October 21, 2005
APPEARANCES: Verne Speirs, Esq.
Christine Freeman, Esq.
(Ms. Freeman as Standby Counsel)

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[Page 7, lines 2-12]

[DIRECT EXAMINATION BY MR. SPEIRS OF SHARON MORGAN]

Q Ma'am, would you please state your full name for the record.

A My name is Sharon Morgan.

Q And, ma'am, if you would just for the court reporter would you spell your last name?

A M-o-r-g-a-n.

Q And, ma'am, if you would, would you tell the Court what you do for a living?

A I work in the Dale County Sheriff's Office. One of my main responsibilities is the warrants, on the warrants that come into our office.

* * * * *

[Page 7, line 24, to page 15, line 6]

Q Ma'am, if you would, would you describe for the Court what the process is for a recalled warrant in the Dale County Sheriff's Department.

A Certainly. Whenever I have a warrant recalled, it comes from -- it depends, of course, where the

warrant has originated. If it's originated from the Clerk's Office, then one of the clerks in that office calls me and notifies me that the warrant has been recalled.

Also, sometimes a judge, or a judge's secretary will call me and tell me that warrant has been recalled.

And at that point in time I look in my computer base, find out where the warrant is actually located and then get it and dispose of it.

Q Do you share a computer system with the Dale County Circuit Clerk's Office?

A No, do not.

Q If -- And if I understand your testimony correctly, if the Dale County Circuit Clerk's Office recalls a warrant, how is that information transferred to you?

A Normally by telephone.

Q Is there any other way?

A On occasion, rare occasions, I will get it in paper, a paper warrant recall.

MR. SPEIRS: May I approach, Your Honor?

THE COURT: Yes.

Q Ma'am, I show what you what's been marked for identification as Government's exhibit 1. Would you please take a look at this document.

A Yes, okay.

Q Do you know what that is?

A I sure do.

Q What is that, ma'am?

A This is the warrant, the habeas warrant that was issued on Bennie Dean Herring for failure to appear.

Q When was that warrant issued?

A The warrant was issued November the seventeenth, oh three.

Q Can you tell the Court the history of that warrant?

A Certainly. Of course it has an address here which says county road one oh nine, Brundidge, Alabama. Coffee County was not written on there when I received it. Just Brundidge, Alabama

THE COURT: Brundidge is in Coffee County?

THE WITNESS: Sir, you know, it's one of those strange -- kind of on a corner there. It's on the corner. Some parts of Brundidge, you know, county roads, some parts are in Coffee County, some parts are in Pike County and some parts are in Dale County.

THE COURT: Okay.

THE WITNESS: So I see "Brundidge" and I immediately think it's Pike County because that's

where the majority of it would be. So I sent it to Pike County for them to locate or attempt to locate Mr. Herring and to execute the warrant.

Q Okay.

A There is a date on here when it was received on the twentieth in Pike County.

Q All right

A Okay. After, I don't remember exactly how long it was, a couple of weeks or so, it was brought to my attention that this was not Pike County. So I called Pike County and asked them –

THE COURT: Called whom?

THE WITNESS: Pike County. The Pike County's Sheriff's Office Sheriff's Office [sic] and spoke to their warrant clerk and asked her to please return the warrant to me because I needed to send it to Coffee County.

Q Yes, ma'am.

A Which that was done and the warrant was sent to Coffee County. And it stayed there for a couple of weeks or so. And then someone in the office felt like they could locate Mr. Herring in Dale County. So I called Coffee County and asked them to please return to me that warrant.

Q Now when you say "return," does that mean the warrant had been recalled, or you just asked for it back?
A I just wanted it back.

Q I understand

A It was never recalled at that point.

Q At that point in time.

A Yes.

Q Okay. Please continue, ma'am. What happened next?

A All right. So then, you know, it was in our system. And then on July the seventh, I believe it was, Sandy called me.

Q Who is Sandy?

A Sandy is from the Coffee County Sheriff's Office who handles the warrants in their office. She called me and asked me if this was still an active warrant.

Q And what did you do?

A I went to my computer and checked my computer base, and according to what I saw, yes, it was. And I told her that. So she asked me if I would fax her a copy of it, and I said, "Of course." So I began my search for the warrant, which was in our office – I thought. And I could not locate it immediately, so I called the Clerk's Office.

Q Where is the Clerk's Office in relation to you?

A I'm in the basement, they're on the third floor.

Q Yes, ma'am.

THE COURT: Same building?

THE WITNESS: Yes, sir. The courthouse.

A So I called up there and I was at that point in time that the warrant had been recalled.

Q All right.

A So I immediately called Sandy in Coffee County and told her that the warrant was no longer active.

Q Now, ma'am, obviously there was some miscommunication somewhere between the Circuit Clerk's Office and the Sheriff's Department, is that right?

A Correct, yes.

Q All right. Can you -- What is your best estimate as to what happened? Where was the breakdown in this particular case?

A Well, of course this is after the fact. You know.

Q Yes, ma'am.

A I found out that the warrant had actually been recalled on February the second.

THE COURT: February second of what year?
THE WITNESS: Of oh four.

A But I did not know that. I did not have that information. That information was not entered into my computer.

So there are many different people that have access to these warrants. Everyone has access to our in-office database, and whoever, and I do not know who it was, returned the warrant to the Clerk's Office did not enter into my database that the warrant had been recalled.

Q Would it be the ultimate conclusion that someplace within the Sheriff's Department there was a breakdown somewhere?

A I would presume that's where it was, yes, sir.

Q Okay. Now, ma'am –

THE COURT: So the warrant had actually been physically returned to the Clerk's Office?

THE WITNESS: Yes, sir.

THE COURT: Someone in the Sheriff's Department had physically returned it but had not put it in your computer.

THE WITNESS: And had not notified me, yes.

MR. SPEIRS: May I approach again, Your Honor?

THE COURT: Yes.

Q Ma'am, I'm showing you what's been marked for identification as Government's exhibit two. And this is the transcript that we had before Judge Coody.

A Okay.

Q And this was back on September twenty-ninth. And I'm directing your attention to page forty-nine. And, ma'am, if you will look at lines nine through twelve. If I could get you to read lines nine through twelve, would you please do so.

A Certainly.

THE COURT: Whose testimony is this?

MR. SPEIRS: Her testimony.

A Line nine. Question: "All right, ma'am. How many times have you had or has Dale County had problems, any problems with communicating about warrants?"

Line twelve. My answer: "Several times."

Q Ma'am, is that what you meant to say, or can you clarify that statement?

A I did not say that. I most emphatically did not say that because that most emphatically is not the case.

Q What is the case?

A I have never, that I can immediately remember ever had any problem with any communication whatsoever between Coffee County Sheriff's Office, Sandy, and myself.

Q Okay. So that is somehow in the record a mistake.

A It's just a mistake. I did not say that.

* * * * *

[Page 15, lines 18 to 22]

THE COURT: It appears it was the Sheriff's Department that made the error, not the Clerk's Office.

MR. SPEIRS: I think that's the best evidence we have, Your Honor.

* * * * *

[DIRECT EXAMINATION OF BENNIE HERRING BY MS. FREEMAN]

[Page 22, lines 6-25]

A Okay. Mark Anderson testified that he executed the warrant against me in Coffee County in good faith. I asked for copies of it. And my point there is, and the point of this long drawn out statement that is made, was the fact that he was not in good faith. And my argument is that at the suppression hearing before Judge Coody was it was not done in good faith. It was done as a vendetta against me because of my investigation into Walter Clark's daughter.

THE COURT: You said it was a vendetta against you by whom?

THE WITNESS: Mark Anderson, the arresting officer.

THE COURT: And why would Mr. Anderson want to—

THE WITNESS: He killed Walter Clark's daughter.

MR. SPEIRS: We would object to that, Your Honor.

THE COURT: Just a minute.

* * * * *

[Page 25, line 1, to page 26, line 20]

And as far as -- I'll leave off the Wallace Clark thing at that point.

A I asked Mark Anderson, I said, "What have I done?"

And he said, "Felony warrant out of Dale County."

I said, "There are no felony warrants out of Dale County because I talked with Judge McLaughlin," he's a friend of mine. I just talked to him the other day. The warrant shouldn't have issued to start with, but it did.

But the point is, I knew there weren't any warrants out of Dale County. I said, "I want a copy of that warrant. I'm a citizen of the United States, I

have a right to have a copy of that. You have to have it in your hand before you arrest me." And they took me and threw me in the back of the car, and I started walking away from my truck, I had already walked away from my truck –

THE COURT: Let me interrupt you a second, more because I know you have a motion in limine on this whole Mr. Anderson and Mr. Clark matter. I just want to get an idea of what this is about. What evidence do you have that Mark Anderson killed Mr. Clark's daughter?

THE WITNESS: I interviewed some of the grand jurors, and I believe they perjured themselves at the grand jury.

THE COURT: Who perjured themselves?

THE WITNESS: Mark Anderson.

THE COURT: So your basis evidence that he did it was that you interviewed the grand jurors.

THE WITNESS: And other witnesses and people that has some knowledge of the case. A lot of people.

Mark Anderson came to my house one night and Deputy Grantham finally got out of the car and came up to the door and he talked to me thirty or forty-five minutes wanting me to drop my investigation of Mark Anderson. This is not too long before I was arrested. And I wouldn't do it for myself. And I -- I was trying to get the district attorney involved in it.

THE COURT: But the district attorney wouldn't do it?

THE WITNESS: No, sir.

* * * * *

[Page 27, lines 6-17]

Q And at the time you asked Mark Anderson for a copy of the warrant he said he had?

A Yes, ma'am.

Q And what did he say to you?

A I said -- I'll tell you the exact words. I said, "You're full of it." I said, "You don't have a warrant for me, and I want to see a copy of it."

He says, "They're out of Dale County."

And I said, "I talked with Judge McLaughlin yesterday, and Judge McLaughlin would have been the one to issue the warrant to start with."

And Mark Anderson said, "It doesn't make a difference, you're fixing to go to jail." * * *

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
V.	)	CASE NO.
	)	1:05-cr-161-T
BENNIE DEAN HERRING	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

The defendant, Bennie Dean Herring ("Herring"), is charged with one felony count of being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and one misdemeanor court of intentionally and knowingly possessing a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. § 844(a). On September 25, 2005, Herring filed a motion to suppress (doc. # 16) asserting that a stop of his vehicle and a subsequent search of him and the vehicle lacked probable cause or consent and were conducted without a warrant or other lawful authority. Herring sought suppression of all physical evidence seized during the search as well as suppression of statements made by him during a custodial interrogation prior to officers advising him of his *Miranda*[1] rights.

Relying on *Arizona v. Evans*, 514 U.S. 1 (1995), the United States argues that officers acted in good faith reliance on information that there was a valid

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[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

outstanding arrest warrant for Herring when they stopped and arrested him. On September 29, 2005, the court held an evidentiary hearing and heard argument on the motion. Based on the evidence and argument of counsel, the court concludes that the motion to suppress is due to be granted in part and denied in part.

FACTS

The salient facts are undisputed. On July 7, 2004, Herring was at the Coffee County Sheriff Department, getting something out of his truck which had been impounded. Coffee County Sheriff's Investigator Mark Anderson arrived at work and learned that Herring was in the impound lot. Knowing from another officer that a warrant for Herring's arrest was outstanding, he asked Coffee County warrant clerk Sandy Pope to check whether there were any current arrest warrants in Coffee County for Herring.

Pope checked her computer database and advised Anderson that there were no active Coffee County warrants on Herring. Anderson then asked Pope to telephone the Dale County Sheriff's Department to see if they had any outstanding active warrants in Dale County on Herring. Pope telephoned Dale County warrant clerk Sharon Morgan who told Pope that there was an active Dale County felony warrant on Herring for Failure to Appear. Pope asked Morgan to fax her a copy of the warrant.

When Anderson learned from Pope that Dale County had an active outstanding warrant on

Herring, he and Deputy Bradley left the Sheriff's department in Bradley's squad car. They pulled behind Herring as he was leaving the Sheriff's Department, turned on their lights, and pulled Herring over. Deputy Bradley radioed dispatch to inform them that they were stopping Herring. Herring was placed under arrest based on the Dale County felony warrant. After Herring was handcuffed Officer Anderson searched him and found in his left front pocket a small plastic bag containing a powder residue which upon analysis tested positive for methamphetamine. The officers then searched Herring's vehicle incident to the arrest. Under the front seat, they found a handgun. The officers also found ammunition and a knife in a Lego® bucket in the front seat.

Herring was placed in the back of the patrol car during the search. While the search progressed, Lieutenant Davis arrived on the scene. As Davis stood outside the patrol car during the search, he heard Pope call over the radio that one of the officers on the scene needed to call her on the Southern Linc.[2] Pope then informed Davis that there was a problem with the warrant.[3] When the officers got back to the Sheriff's Department, they discovered that the

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[2] The Southern Linc is a type of wireless communication that is more secure than the radio.

[3] When Pope spoke to Morgan, she asked Morgan to fax a copy of the warrant to her. Shortly thereafter, Morgan called Pope to inform her that she could not confirm the warrant because the warrant had been recalled. Less than fifteen minutes elapsed between the time Pope called Morgan and Morgan called Pope back.

warrant had been recalled. Nonetheless, the evidence shows that before the officers learned there was no warrant for him, Herring had already been arrested and the methamphetamine, firearm and ammunition had been found.

DISCUSSION

Resolution of Herring's motion to suppress the seized evidence is governed by *Arizona v. Evans*, 514 U.S. 1 (1995). In *Evans*, the Supreme Court recognized a good faith exception to the exclusionary rule for evidence seized incident to an arrest which occurred as the result of an erroneous computer record indicating the existence of a valid arrest warrant. 514 U.S. at 7. Relying on *United States v. Leon*,[4] the Court observed that the purpose of the exclusionary rule is to deter unlawful police conduct, "not mistakes by court employees." *Id.* at 14. "[T]here is no basis for believing that the application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed." *Id.* at 15. The Court concluded that "[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees." *Id.* Consequently, the *Leon* good-faith inquiry requires the court to determine whether the officers' conduct was objectively reasonable – that is, whether a reasonable officer would have relied on the information from the warrant clerk and acted in a similar manner.

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[4] *United States v. Leon*, 468 U.S. 897 (1984).

Based on the evidence presented at the hearing, the court finds that the officers acted in good faith when they stopped and arrested Herring based on the representations of the warrant clerks that there was an active outstanding felony warrant for Herring in Dale County.[5] The evidence also shows that as soon as the warrant clerks discovered their error, they informed the officers. Thus, there is simply no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes. *Id.* at 14-15 ("[N]o evidence [exists to show] that court employees are inclined to ignore or subvert the Fourth Amendment . . ."). The defendant's motion to suppress the physical evidence that was seized during the search incident to arrest on July 7, 2004, is due to be denied.

The defendant also seeks suppression of statements he made to police officers during the search of his vehicle, arguing that he was under arrest and subjected to custodial interrogation without the benefits of the *Miranda* warnings.[6] The United States concedes that Herring was not given

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[5] Herring suggests that his truck was impounded so that he would be "suckered" into going to the Coffee County Sheriff's Department. First, Herring presented no evidence that the officers who were involved in his arrest were also involved in any subterfuge to get him to go to the sheriff's office. Moreover, even if the court were to assume that Herring had been "suckered" into going to the Sheriff's Department, Herring has presented no evidence that ties any subterfuge in any way to his subsequent arrest. Herring's suggestion amount to mere speculation.

[6] *Miranda, supra.*

Miranda warnings at the time he was arrested and before he made incriminating statements. At the evidentiary hearing on the defendant's motion to suppress, the government stipulated, in open court and on the record, that none of Herring's statements derived from the stop, search and seizure on July 7, 2004, would be admitted into evidence by the government during its case in chief.[7] Thus, the defendant's motion to suppress statements made during his stop, search and seizure on July 7, 2004, is due to be granted.

CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the defendant's motion to suppress be GRANTED in so far as it relates to statements made by Herring during the stop, search and seizure on July 7, 2004. It is further the RECOMMENDATION of the Magistrate Judge that the defendant's motion to suppress be DENIED in so far as it relates to any physical evidence seized on July 7, 2004. It is further

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[7] Of course, should the defendant choose to testify at trial, his statements may be admissible for impeachment purposes. *See Walder v. United States*, 347 U.S. 62, 65 (1954); *see also, Harris v. New York*, 401 U.S. 222, 224 (1971); *United States v. Caron*, 474 F.2d 506, 508 (5th Cir. 1973) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.")

ORDERED that the parties shall file any objections to the said recommendation on or before **October 7, 2005.**[8] Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 3rd day of October, 2005.

/s/Charles S. Coody
CHARLES S. COODY
CHIEF UNITED STATES
MAGISTRATE JUDGE

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[8] The court shortens the time for filing objections because this case is set for jury selection on October 12, 2005.

PETITIONER'S BRIEF

94

(7)

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No. 07-513

IN THE

Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment requires the suppression of evidence seized incident to a warrantless arrest for which there was no probable cause, conducted in sole reliance on an inaccurate report from other law enforcement personnel regarding the existence of an outstanding warrant.

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Billeaud, Jacques *Infrared Cameras Help Police Scan for Trouble*, L.A. Times, Sept. 9, 2007, at B7.....37
Brief of *Amici Curiae* in Support of Petitioner, *Arizona v. Evans* (No. 93-1660).....13
Burnham, David, *F.B.I. Says 12,000 Faulty Reports on Suspects Are Issued Each Day*, N.Y. Times, Aug. 25, 1985, at 1 36
FBI, Press Release: National Crime Information Center Sets New Record (Jan. 17, 2006) 37
Guynes, Randall, & Russell Wolff, Un-served Arrest Warrants: An Exploratory Study (2004) ...35

Irons, Peter, The Courage of Their Convictions (1988) 35
LaFave, Wayne R., Search and Seizure (4th ed. 2004) 29
Laudon, Kenneth C., *Data Quality and Due Process in Large Interorganizational Record System*, Communications of the ACM, vol. 29 no.1 (Jan. 1986) 36
U.S. Congress, Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy, OTA-CIT-296* (June 1986) 36
U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004 (2006) 35
U.S. Dep't of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2003 (2006) 36

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. 1a-12a) is published at 492 F.3d 1212. The district court's opinion explaining the denial of petitioner's motion to suppress (Pet. App. 13a-18a) is published at 451 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2007. The petition for writ of certiorari was filed on October 11, 2007. This Court granted the petition on February 19, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

For nearly a century, this Court has applied the exclusionary rule in federal criminal prosecutions where the government seeks to rely on evidence it obtained as a direct result of unconstitutional law enforcement conduct. In this case, officers from the Coffee County, Alabama, Sheriff's Department arrested petitioner Bennie Dean Herring in violation of the Fourth Amendment. The sole basis for the officers' action was their incorrect belief that there was an outstanding warrant for petitioner's arrest – a belief that was entirely the product of an inaccurate report from other law enforcement personnel who had failed to properly maintain police department warrant records. Breaking from this Court's longstanding precedent, the courts below permitted the prosecution to introduce the evidence seized incident to that unconstitutional arrest.

1. On November 17, 2003, the Dale County, Alabama, Circuit Clerk's Office issued an arrest warrant for petitioner based on his failure to appear in court. J.A. 56. The warrant was sent, in the normal course of business, to the Dale County Sheriff's Department for execution. Personnel in the Sheriff's Office, which maintains its own records independent of the Court Clerk's office, J.A. 39, 43, logged the information regarding the warrant into the office computer. J.A. 38.

Because petitioner's residence was in a neighborhood at the boundary of three counties, the Dale County Sheriff's Department enlisted the help of two neighboring departments in serving the warrant. The Dale County Department initially sent

the warrant to Pike County for execution. J.A. 56-57. A few weeks later, when the Dale County Sheriff's warrant clerk determined that petitioner's house was not located in Pike County, she requested return of the physical warrant; at some point after the warrant arrived back at the Dale County department, she transferred it to the Coffee County Sheriff's Office. J.A. 57. After the warrant had been in Coffee County for "a couple of weeks or so," the Dale County department contacted the Coffee County department and requested that the warrant be returned to Dale County since Dale County law enforcement personnel "felt like they could locate Mr. Herring in Dale County." *Id.*

On February 2, 2004, the Dale County Circuit Clerk's Office recalled the arrest warrant. J.A. 60.[1] Dale County Sheriff's Office personnel physically removed the warrant from the department's files and returned the warrant to the Circuit Clerk's Office. *Id.*; Pet. App. 15a. Thus, as of February 2, 2004, there was no longer an outstanding warrant for petitioner's arrest. But due to a "breakdown" that occurred "someplace within the Sheriff's Department," J.A. 60, the department neglected to update its computerized records when it received and acted on the recall order. Pet. App. 4a, 15a. As a result of this failure, the computer file that the Dale County Sheriff's Office used as a ready reference for its active warrants did not reflect the fact that the court had recalled the warrant. Pet. App. 15a. To the contrary, the file continued to indicate

[1] While the precise reason for the recall does not appear in the record, petitioner testified without contradiction that the initial issuance of the warrant had been mistaken. J.A. 63.

(incorrectly) that an outstanding warrant existed for petitioner's arrest.

2. Five months later, on July 7, 2004, petitioner appeared at the Coffee County Sheriff's Department to retrieve some personal possessions from an impounded vehicle. Coffee County Investigator Mark Anderson, who was acquainted with petitioner,[2] learned that petitioner was in the impoundment lot. Anderson asked Sandy Pope, the Coffee County Sheriff's Office warrant clerk, to check her records to see whether there might be an outstanding warrant for petitioner's arrest. J.A. 18-19. When Pope told Anderson that there was no warrant in the Coffee County department's files, Anderson asked her to telephone the Dale County Sheriff's Department to see whether it had a warrant. *Id.*

Pope called her counterpart in the Dale County Sheriff's Office, Sharon Morgan, with whom she was in fairly regular contact. *Id.* at 43. When Pope asked her whether the Dale County Sheriff had a warrant for petitioner's arrest, Morgan checked her computer database and answered "Yes." *Id.* at 41. Pope told Anderson that a warrant existed, and then asked Morgan to retrieve the actual warrant and fax a copy to her. *Id.* at 35.

When Morgan checked the paper file, however, she could not find any arrest warrant for petitioner.

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[2] Among other things, petitioner had repeatedly alleged to the district attorney that Anderson was involved in the unsolved murder of a local teenager. *See* J.A. 64-65. Shortly before the events leading to petitioner's arrest, Inspector Anderson and another officer had appeared at petitioner's house, pressing him to drop his complaints. *See id.*

Unable to locate any warrant, Morgan called the Dale County Circuit Court Clerk's Office, which informed her – just as it had informed her department some five months before – that the warrant had been recalled. *Id.* at 41-42, 59-60.

Investigator Anderson, however, had already left the Sheriff's Department in pursuit of petitioner, who had begun driving away from the impoundment lot. Less than a mile away, Anderson and a colleague, Deputy Neil Bradley, stopped petitioner. Bradley informed petitioner that he was under arrest. When petitioner asked "Under arrest for what?," Bradley told him: "There is a warrant on you in Dale County." *Id.* at 20. Although petitioner explained that he had recently seen the Dale County Circuit Judge and that no such warrant existed, *id.* at 63, 65, the officers nonetheless arrested petitioner immediately, *id.* at 20, rather than awaiting physical confirmation of the warrant from the Dale County Sheriff's Office. Having arrested and handcuffed petitioner, Anderson then performed a pat-down during which he found a small bag in petitioner's pocket with powder residue that tested positive for methamphetamine. *Id.* at 21-22. Bradley conducted a search incident to arrest of petitioner's truck that uncovered a handgun and ammunition. *Id.* at 22-23.

Pope received Morgan's telephone call informing her that no warrant existed while Anderson and Bradley were completing petitioner's arrest. *Id.* at 42. Pope then called and informed the officers, who were still at the scene of petitioner's arrest, that there was a "problem" with the reported warrant, *id.* at 26 – namely, that it did not exist.

3. Petitioner was indicted in the United States District Court for the Middle District of Alabama on charges of possessing methamphetamine and being a felon in possession of a firearm, in violation of 21 U.S.C. § 844(a) and 18 U.S.C. § 922(g)(1). Shortly thereafter, petitioner, proceeding *pro se* (but with standby counsel), moved to suppress all evidence of the methamphetamine and firearm as inadmissible fruits of his unlawful arrest.

The magistrate judge to whom the motion had been assigned recommended that petitioner's motion be denied. J.A. 66, 71.[3] He concluded that resolution of petitioner's motion was "governed by *Arizona v. Evans*, 514 U.S. 1 (1995)," J.A. 69, where this Court had held that evidence seized in violation of the Fourth Amendment need not be suppressed when the unconstitutional arrest has resulted from clerical errors by court personnel. According to the magistrate judge, the arresting officers and police department warrants clerks here were no more "inclined to ignore or subvert the Fourth Amendment" than the court personnel involved in *Evans*. J.A. 70 (quoting *Evans*, 514 U.S. at 14-15). Thus, exclusion was not required to achieve deterrence of future Fourth Amendment violations.

The district court accepted the magistrate judge's report and recommendation. Pet. App. 13a. The district court assumed that the arrest violated the Fourth Amendment, and accordingly framed the question before it as whether "the good-faith

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[3] The magistrate judge also recommended granting petitioner's motion to suppress certain post-arrest statements for failure to give *Miranda* warnings. J.A. 70-71. That issue is not before the Court.

exception to the exclusionary rule, as articulated in *Evans* should be extended to mistakes by police personnel." *Id.* at 16a. The district court found that the error was "the fault of the Dale County Sheriff's Department, not that of the Dale County Clerk's Office." *Id.* at 15a. But it declined to suppress the evidence, given no showing of "routine problems with disposing of recalled warrants" in Dale County. *Id.* at 17a.

At trial, the government introduced the evidence that the officers had seized incident to petitioner's arrest. Ultimately, petitioner was convicted by a jury of both counts in the indictment. The district court sentenced him to 27 months' imprisonment.

4. The sole issue on appeal to the Eleventh Circuit was whether the district court had erred in admitting the evidence seized incident to petitioner's arrest. The court of appeals recognized that "[t]he searches of Herring's person and truck cannot be justified as incident to a lawful arrest because the arrest was not lawful. There was no probable cause for the arrest and the warrant had been rescinded. That means the searches violated Herring's Fourth Amendment rights." Pet. App. 5a. Nonetheless, the court of appeals held that the evidence should be admitted and affirmed petitioner's conviction and sentence.

The court of appeals rejected the government's argument that *Evans* itself justified the admission of the illegally obtained evidence in this case as "a red herring," *id.* at 6a, given *Evans*' express refusal to address the question whether an exception to the exclusionary rule should obtain when "police

personnel rather than court employees are the source of the error" leading to an unconstitutional arrest, *id.* at 7a (citing *Evans*, 514 U.S. at 15 n.5). Instead, the court of appeals looked to *United States v. Leon*, 468 U.S. 897 (1984). It interpreted *Leon* to require that three conditions be satisfied in order to apply the exclusionary rule to the fruits of an unlawful search and seizure. Pet. App. 9a. First, "there must be misconduct by the police or by adjuncts to the law enforcement team." *Id.* Second, application of the exclusionary rule must cause "appreciable deterrence" of such misconduct. *Id.* And third, "the benefits of the rule's application must not [sic] outweigh its costs." *Id.*

Although the Eleventh Circuit acknowledged that there was law enforcement misconduct in this case that satisfied the first condition of its test, it held that the second and third conditions were not satisfied. The Court of Appeals surmised that when one law enforcement agency acts negligently in providing information leading to an arrest to another department, it is unlikely that the exclusionary rule would deter sloppy recordkeeping because the cost would not fall on the responsible party. *Id.* at 11a. In addition, the Eleventh Circuit opined *sua sponte* that applying the exclusionary rule even in cases involving only one law enforcement agency "will not deter bad record keeping to any appreciable extent, if at all." *Id.* at 9a-10a.

The court advanced two main rationales in support of this hypothesis. First, the court asserted that excluding evidence in such cases would not deter negligent recordkeeping because "the conduct in question is a negligent failure to act" and

"[d]eterrents work best where the targeted conduct results from conscious decision making." *Id.* at 10a. Second, the Eleventh Circuit asserted that the police "already [have] abundant incentives for keeping records current." *Id.* Based on these rationales, the Eleventh Circuit concluded that any "minimal deterrence" the exclusionary rule might achieve against the type of law enforcement error in this case would not outweigh the cost of exclusion. *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

This case involves a clear-cut violation of the Fourth Amendment. The police officers who arrested petitioner had neither a valid arrest warrant or probable cause to believe that he had committed any crime. Because law enforcement's own errors caused this unconstitutional arrest and its accompanying and equally unconstitutional search, the exclusionary rule requires that evidence that the officers gained from the search be suppressed.

I. Exclusion is the traditional remedy when, as here, the government seeks to introduce evidence it has obtained solely as a result of an unconstitutional search or seizure. *See, e.g., Weeks v. United States*, 232 U.S. 383 (1914); *Elkins v. United States*, 364 U.S. 206 (1960). This case fits that classic mold: but for the officers' unconstitutional arrest and search, they would not have found the evidence introduced at petitioner's trial. Applying the exclusionary rule thus properly returns the government to the *status quo ante*, precluding law enforcement from profiting from its own illegality. This result distinguishes this

case from the scenario in *Hudson v. Michigan*, 547 U.S. 586 (2006), in which the constitutional violation (the failure to knock and announce) had "nothing to do with the seizure of the evidence" because the officers would have obtained it anyway. *Id.* at 594. While this Court declined to enforce the exclusionary rule in *Hudson*, it has never wavered from the need to suppress evidence that law enforcement obtains directly and solely because of its own illegal conduct.

II. The "good faith" exceptions to the exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897 (1984), *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), and *Arizona v. Evans*, 514 U.S. 1 (1995), do not apply to this case. Those cases all involved situations in which police acted in reasonable reliance on a judicial-branch representation that a warrant provided authorization for their action. There was accordingly no police misconduct in those cases to deter. By contrast, the judiciary in this case expressly informed the police that there was *no* judicial authorization to arrest petitioner. And nothing about the fact that the law enforcement agent who was aware of that notification was not one of the officers who actually arrested and searched petitioner in violation of the Fourth Amendment alters the equation. As this Court has often recognized, law enforcement personnel are collectively "engaged in the often competitive enterprise of ferreting out crime," *Evans*, 514 U.S. at 15, and they are collectively held responsible for relevant knowledge, *see, e.g.*, *United States v. Hensley*, 469 U.S. 221 (1985); *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971); *see also, e.g.*, *Kyles v. Whitley*, 514 U.S. 419 (1995);

Arizona v. Roberson, 486 U.S. 675 (1988). The exclusionary remedy applies collectively as well. *See, e.g., Elkins v. United States*, 364 U.S. 206, 217 (1960).

III. Nor was the Eleventh Circuit justified in supposing, *sua sponte*, that the nature of the law enforcement error here – negligent recordkeeping – warrants suspending the exclusionary rule. It is well established that carelessness that leads to unjustified impingements on individual privacy can and should be deterred. Furthermore, cases involving inaccurate police recordkeeping may in fact be less amenable to alternative deterrence mechanisms, such as internal discipline or civil sanctions, than other types of police misconduct. One reason for this is that it may be impossible even to identify the responsible individuals in cases involving negligent recordkeeping – especially when the misconduct involves acts of omission. And even if the departmental employee who has failed to note the recall of a warrant can be identified, there may be a serious question of causation given the number of intervening actors and events that contributed to the unconstitutional arrest. The virtually certain availability of qualified immunity for the arresting officers themselves further undercuts the deterrent potential of civil liability.

Finally, contrary to the unsupported speculation of the court of appeals, law enforcement departments do not have a freestanding incentive to purge their records of recalled or stale warrants. To the contrary, if employees' laxity can lead to the discovery of admissible evidence that otherwise would be unavailable – as it will if this Court

abandons the exclusionary rule here – then departments will have a powerful reason to condone such behavior. Particularly given the increased use of coordinated law enforcement databases, and the troubling evidence of their potential for inaccuracy, this Court should reaffirm its longstanding position that evidence seized during unconstitutional searches that are the product solely of law enforcement negligence must be suppressed.

ARGUMENT

I. THIS COURT HAS LONG REFUSED TO ALLOW THE GOVERNMENT TO INTRODUCE EVIDENCE IT HAS OBTAINED FROM A WARRANTLESS ARREST FOR WHICH THE POLICE LACKED PROBABLE CAUSE.

1. There is no question that the arrest in this case violated the Fourth Amendment. At the core of the Fourth Amendment lies the basic proposition that the police may not arrest an individual if they have neither a valid arrest warrant issued by a judicial officer nor probable cause to believe that the individual has committed a crime. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975). The police here had neither. First, it is undisputed that at the time Investigator Anderson arrested petitioner, no valid warrant for petitioner's arrest existed. The purported warrant on which Anderson relied had been recalled by the issuing court over five months earlier. J.A. 59-60; *cf. Virginia v. Moore*, No. 06-1082, slip op. at 8 (Apr. 23, 2008) ("compliance with

[the warrant requirement] is readily determined (either there was or was not a warrant)"). Second, the sole basis the government identified for the decision to pursue, stop, and arrest petitioner was the reported existence of that warrant, *see* J.A. 20, 28, and there is no such thing as "probable cause to believe in the existence of an arrest warrant." *See, e.g., Wilson v. City of Boston*, 421 F.3d 45, 54-55 (1st Cir. 2005). "Probable cause" is a concept that refers to the underlying facts regarding a suspect's conduct, and not to how other officials have assessed those facts; it exists where "'the facts and circumstances within [police officers'] knowledge and of which they ha[ve] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925) (third alteration in the original). Accordingly, this Court in *Arizona v. Evans* held that an arrest based upon an officer's reasonable but erroneous belief in the "existence of an outstanding arrest warrant" occurs "*in violation of the Fourth Amendment.*" 514 U.S. 1, 3-4 (1995) (emphasis added).[4]

2. Because the arrest in this case violated the Fourth Amendment, there is no dispute that the

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[4] Tellingly, despite an *amicus* brief filed by a dozen states arguing that Evans' arrest "was constitutional," *see* Brief of *Amici Curiae* in Support of Petitioner at 10, *Arizona v. Evans* (No. 93-1660), not a single Justice adopted that position. The sole question that divided this Court was the propriety of excluding the evidence seized incident to an arrest that all Justices agreed violated the Fourth Amendment.

search of petitioner and his truck was also unconstitutional. While this Court has long recognized "the right on the part of the Government . . . to search the person of the accused when *legally* arrested to discover and seize the fruits or evidences of crime," *Weeks v. United States*, 232 U.S. 383, 392 (1914) (emphasis added), this Court has also emphasized that "[o]f course, a search without warrant incident to an arrest is dependent initially on a valid arrest." *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950); *see also Moore*, slip op. at 11 ("officers may perform searches incident to *constitutionally permissible* arrests") (emphasis added). Thus, the court of appeals correctly held that "[t]he searches of Herring's person and truck cannot be justified as incident to a lawful arrest because the arrest was not lawful. There was no probable cause for the arrest and the warrant had been rescinded. That means the searches violated Herring's Fourth Amendment rights. . . ." Pet. App. 5a.

3. The sole issue before this Court is whether the fruits of law enforcement's unconstitutional conduct may be used as evidence against petitioner in a criminal prosecution. This Court's longstanding jurisprudence dictates that they may not.

Exclusion of illegally seized evidence is the traditional remedy when the federal government seeks to introduce evidence that law enforcement obtained as a result of its violating a defendant's Fourth Amendment rights. Nearly a century ago, this Court unanimously adopted the exclusionary rule for federal prosecutions. *Weeks*, 232 U.S. at 398. This Court explained that if something that

police seize without any legitimate justification can be introduced against a citizen in a criminal prosecution, then:

> the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393.

Six years later, this Court again confronted a case in which the government, "while in form repudiating and condemning the illegal seizure, [sought] to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Silverthorne Lumber Co., Inc., v. United States*, 251 U.S. 385, 391 (1920). Writing for the Court, Justice Holmes reaffirmed that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that [] evidence so acquired . . . shall not be used at all" in a criminal prosecution. *Id.* at 392; *see also Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (exclusionary rule is necessary to prevent Fourth Amendment from being "an empty promise").

In the present day, the "general rule in a criminal proceeding" remains "that statements and

other evidence obtained as a result of an unlawful warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." *INS v. Lopez-Mendez*, 468 U.S. 1032, 1040-41 (1984); *see also Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (stating that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt").[5] Accordingly, this Court (and of course other federal and state courts) has continued to suppress the fruits of warrantless arrests where, as here, the government lacked probable cause to believe that the defendant had committed a crime.[6] Excluding evidence obtained through illegal warrantless searches "vindicate[s]" citizens' core constitutional entitlement to "shield 'their persons, houses, papers, and effects,' U.S. Const., Amdt. 4, from the

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[5] To be sure, the exclusionary rule applies only to the prosecution's case-in-chief, *see, e.g., Walder v. United States*, 347 U.S. 62 (1954) (permitting the use of illegally obtained evidence for purposes of impeachment), and does not apply in proceedings other than criminal trials, *see Hudson*, 547 U.S. at 612 (Breyer, J., concurring) (collecting cases). These limitations on the scope of the exclusionary rule are not at issue in petitioner's case.

[6] For cases suppressing physical evidence discovered incident to warrantless arrests lacking probable cause, see, e.g., *Sibron v. New York*, 392 U.S. 40, 62-63 (1968); *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963). For cases suppressing statements made incident to warrantless arrests without probable cause, see, e.g., *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003); *James v. Illinois*, 493 U.S. 307, 311 (1990); *Taylor v. Alabama*, 457 U.S. 687, 694 (1982).

government's scrutiny." *Hudson,* 547 U.S. at 593 (opinion of the Court).

As this Court has recently reiterated, the "remedial objective[]" of the exclusionary rule is deterrence of illegal police behavior. *Id.* at 591 (internal citation omitted). In *Hudson*, this Court distinguished violations of the knock-and-announce rule (since the police in such cases have a warrant that will entitle them to search in any event), from "cases excluding the fruits of unlawful warrantless searches," *id.* at 593, where constitutional violations can "produc[e] incriminating evidence that could not otherwise be obtained," *id.* at 596. While this Court concluded in *Hudson* that enforcement of the knock-and-announce rule "hardly require[s]" the "[m]assive deterrence" provided by the exclusionary rule, *id.* at 596, it has never wavered from the necessity of applying the exclusionary rule when police illegality is the only reason the government was able to seize evidence "otherwise it would not have had." *Silverthorne Lumber,* 251 U.S. at 391. In the latter situation, enforcing the exclusionary rule simply erases the improper "advantages" that the government gained by "doing the forbidden act" and returns the government to the same position it occupied before its negligent and unconstitutional conduct. *Id.* Any other approach would create incentives for the government to violate the Constitution in the hope of obtaining otherwise unavailable evidence.

II. THE EXCEPTION TO THE EXCLUSIONARY RULE FOR ILLEGAL SEARCHES THAT RESULT FROM JUDICIAL ERRORS DOES NOT APPLY TO ILLEGAL SEARCHES CAUSED BY POLICE ERRORS.

This Court has recognized some narrow exceptions to the exclusionary rule in situations in which the police lacked either a valid warrant or probable cause to make an arrest. In *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), this Court permitted the introduction of evidence the police seized in reasonable reliance on current search warrants later held to be invalid. In *Arizona v. Evans*, 514 U.S. 1 (1995), this Court permitted the introduction of evidence the police seized in reasonable reliance on a judicial official's mistaken representation that an arrest warrant existed. But this case involves an error that is different in kind, and not merely degree, from the errors in *Leon*, *Sheppard*, and *Evans*. Here, there was no *judicial* mistake at all; this case involves a Fourth Amendment violation caused solely by *law enforcement* negligence. Consequently, the exclusionary rule's time-honored principle that law enforcement should not be allowed to benefit from its own unconstitutional conduct controls.

A. *Leon* and *Sheppard* Depended on Officers' Reasonable Reliance on Judicial Errors.

In 1984, this Court recognized what is often called the "good-faith exception" to the exclusionary rule. *United States v. Leon*, 468 U.S. 897, 913 (1984). In *Leon* and its companion case,

Massachusetts v. Sheppard, 468 U.S. 981 (1984), this Court held that where officers have reasonably relied on an outstanding search warrant issued by a neutral and detached magistrate, the evidence seized under that warrant can be excepted from the exclusionary rule even if the warrant is subsequently determined to be invalid. In this case, by contrast, there was no such warrant.

1. In *Leon*, a state court judge issued a search warrant on the basis of a detailed affidavit prepared by an experienced and well-trained investigator. 468 U.S. at 902. Subsequently, however, a federal district court concluded that the warrant was invalid because the affidavit failed to establish probable cause under this Court's then-existing, but subsequently modified, test for assessing the reliability of an informant's tip. *See id.* at 904-05 & n.5. Thus, the district court suppressed the evidence obtained under the warrant. *Id.* at 904.

This Court, however, held that the exclusionary rule could be "modified somewhat" under the particular circumstances of the case. *Id.* at 905. While *Leon* is sometimes referred to as a case permitting a "'good faith' exception to the Fourth Amendment's general exclusionary rule," *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004), that is not precisely accurate. To the contrary, this Court recognized that "'[good] faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n. 13 (quoting *Beck v. Ohio*,

379 U.S. 89, 97 (1964) and *Henry v. United States*, 361 U.S. 98, 102 (1959)). Rather, this Court held that the evidence at issue in *Leon* could be admitted because "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion [was therefore] inappropriate." 468 U.S. at 926.

In reaching that conclusion, the Court emphasized that the primary goal of the exclusionary rule is the deterrence of unconstitutional police conduct. *See Leon*, 468 U.S. at 916. But when the police pursue a thorough investigation, then seek and obtain a warrant from a judicial officer with expertise in assessing probable cause, and ultimately execute the warrant in a procedurally proper way, "there is no *police* illegality . . . and thus nothing to deter." *Id.* at 921 (emphasis added). In other words, when police act not solely on their own initiative, but instead in reasonable reliance on the intervening probable cause determination of a neutral and detached magistrate, there is little reason to believe that exclusion of evidence that later turns out to have been seized illegally will "alter the behavior of individual law enforcement officers *or the policies of their departments*." *Id.* at 918 (emphasis added).[7]

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[7] The Court explained later that:

> References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the

And because "[j]udges and magistrates are not adjuncts to the law enforcement team," but rather "neutral judicial officers" who "have no stake in the outcome of particular criminal prosecutions," *id.* at 917, the Court saw no reason to believe that exclusion was necessary to provide the appropriate incentives for judicial officers to comply with the Fourth Amendment's commands. *See also Mickens v. Taylor*, 535 U.S. 162, 173 (2002). (This Court "do[es] not presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule.").

2. *Sheppard* applied the reasoning in *Leon* to a situation in which the judge issuing a search warrant committed a "technical error," 468 U.S. at 984, that rendered the warrant as issued noncompliant with the Fourth Amendment's particularity requirement. The warrant in question was issued over the weekend and the appropriate forms were unavailable to either the police or the issuing judge. The requesting officer, who undeniably provided sufficient information to meet the probable cause requirement, *see id.* at 985, 989, explained this problem to the judge and requested that the judge make the necessary notations on the proffered form. The judge assured the officer that he had done so, but failed to make all the needed emendations. *Id.* at 928.

> basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. *See Whiteley v. Warden*, 401 U.S. 560, 568 (1971).

Leon, 468 U.S. at 923 n.24.

This Court held that suppression of evidence seized pursuant to the warrant was not required. Because "the police conduct in this case clearly was objectively reasonable and largely error-free[, a]n error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake." *Id.* at 990. The Court identified a principle of symmetry: "If an officer is required to accept at face value the judge's conclusion that a warrant form is invalid, there is little reason why he should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential problems." *Id.* at 990.[8] Thus, *Sheppard* reaffirmed the uncontroversial proposition that if a judge determines that a warrant is defective, the police cannot disregard that conclusion and continue to rely on the warrant anyway.

B. Like the Narrowly Drawn Exception to the Exclusionary Rule Recognized in *Leon* and *Sheppard*, the *Evans* Exception Rests on the Presence of Judicial Error.

Like *Leon* and *Sheppard*, *Arizona v. Evans*, 514 U.S. 1 (1995), presented a situation in which police acted in reasonable reliance on a judicial-branch

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[8] As in *Leon*, the *Sheppard* exception to the exclusionary rule is narrowly drawn. The Court specifically reserved the question whether "an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper scope of the search would be justified in failing to notice a defect like the one in the warrant in this case." 468 U.S. at 990 n.6.

representation that a warrant provided authorization for their action – this time, for an arrest.

In mid-December 1990, a Phoenix Justice of the Peace issued an arrest warrant for Evans for failure to appear in conjunction with several traffic violations. Evans appeared in court a week later, and the warrant was therefore quashed. Inexplicably, however, court personnel failed to notify the sheriff's office, so the warrant remained in the police computer database. 514 U.S. at 4. A month later, after a police officer noticed Evans driving the wrong way down a one-way street, and stopped him, a check of the database indicated an outstanding warrant, leading to Evans' arrest and an incident search that discovered a bag of marijuana in Evans' car.

Consistent with *Leon*, this Court held that because the arrest and search were the product of judicial error, suppression was not required. The Court explained that, like the state-court judge whose error ostensibly authorized the search in *Leon*, "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" and that as such "they have no stake in the outcome of particular criminal prosecutions." *Id.* at 15 (citations omitted). Therefore, "[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for *clerical errors of court employees*." *Id.* at 16 (emphasis added).[9]

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[9] The Court specifically declined to address the question whether suppression would have been required if the error in

C. The Error at Issue Here Was Attributable Solely to Police Negligence, to Which This Court Has Consistently Applied the Exclusionary Rule.

This case differs from *Leon*, *Sheppard*, and *Evans* in a critical respect: while each of those cases involved an affirmative indication *from a court* that a warrant existed, this case involved an express indication from a court that *no* warrant existed. The decision to arrest petitioner, unlike the decisions to search Leon and Sheppard and to arrest and search Evans, was thus the product *entirely* of law enforcement's own errors and negligence. This Court has never before suggested that there should be any exception to the exclusionary rule when the error that produced otherwise-unavailable evidence is attributable solely to police department personnel. And contrary to the court of appeals' suggestion, the exclusionary rule retains full force regardless of whether one law enforcement agent violated the Fourth Amendment, or whether several agents collectively did so.

1. It is important to emphasize at the outset that the exclusionary rule would undoubtedly have applied had Inspector Anderson or Deputy Bradley personally known, at the time of petitioner's arrest, that the Dale County warrant had been recalled. An arrest and accompanying search conducted by an officer who knows that he lacks legal authorization presents the classic case of an officer acting illegally to obtain evidence he otherwise could not have

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question had been attributable to police personnel. *Evans*, 514 U.S. at 16 n.5.

acquired. Only exclusion can sufficiently deter the incentives an officer would otherwise have to conduct such a search. *A fortiori*, suppression would be required if Anderson or Bradley, having been directly notified that the court had actually *recalled* petitioner's warrant, nonetheless had continued to rely on the now-invalid warrant as a justification for conducting the arrest and search.

2. In this case, that same relevant knowledge – that the previously issued warrant was now invalid – was undeniably within the possession of the police, but it was dispersed. *Some* law enforcement agent knew that the warrant had been recalled, because that person, having been contacted by the Dale County Circuit Clerk's Office, took the warrant out of the Sheriff's Office files and physically returned it to the court clerk. Pet. App. 12a; J.A. 60. That official then failed to notify his or her colleagues of the recall and failed to update the Sheriff's Office records to reflect the recall. As a result, the Dale County Sheriff's Department warrant clerk inaccurately told her counterpart in the Coffee County Sheriff's Office that a warrant existed, and the Coffee County Sheriff's Department clerk in turn repeated this inaccurate information to Anderson and Bradley, who arrested and searched petitioner.

The Court of Appeals held that the collective nature of the relevant knowledge here rendered the exclusionary rule inapplicable. Applying the exclusionary sanction here, it suggested, would be inappropriate because it "would scuttle a case brought by officers . . . . [who] were entirely innocent

of any wrongdoing or carelessness." Pet. App. 11a.[10] But this Court's decisions take the opposite position, holding that the dispersion of relevant knowledge among law enforcement agents who are acting in concert does not insulate their actions from customary Fourth Amendment principles.

For starters, this Court has squarely held that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on [information from] fellow officers to make the arrest," no matter how reasonable that reliance. *Whiteley*, 401 U.S. at 568. In *Whiteley*, a sheriff in Carbon County obtained an arrest warrant for the petitioner. The sheriff provided literally no details supporting his application, thus rendering the underlying warrant invalid. But having obtained this invalid warrant, the Carbon County sheriff then broadcast the existence of the warrant statewide. Ultimately, a police officer in a different county arrested Whiteley in good-faith reliance on the Carbon County report, and conducted a search incident to that arrest. This Court held that the arrest and search violated the Fourth Amendment because it was not supported by probable cause, and thus "the evidence secured as an incident thereto

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[10] Of course, the case here was brought by the United States, and not by any of the departments involved in conducting the underlying search and arrest. But surely, the Court of Appeals could not be taking the position that some version of the reverse silver-platter doctrine permits introduction of evidence in federal prosecutions on the basis that the illegal search was conducted by state or local police officers. *See also infra* pp. 28-29.

should have been excluded from [Whiteley's] trial." *Id.* at 569.

This Court has subsequently cautioned that *Whiteley* should not be read to stand for any global proposition that finding a Fourth Amendment violation is "synonymous" with requiring suppression. *Evans*, 514 U.S. at 13. But the Court has never cast any doubt on *Whiteley*'s holding that a Fourth Amendment violation occurred in the first place, nor on its holding that suppression was required under the circumstances of that case. Indeed, in *Leon*, this Court indicated that suppression remained an appropriate remedy in *Whiteley* itself: "Nothing in our opinion suggests," the Court emphasized, that an officer who obtained a warrant he *knew* to be invalid could "then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." 468 at 923 n.24.. Under those circumstances, the officer "will have no reasonable grounds for believing that the warrant was properly issued," and thus suppression would be warranted. *Id.* at 923.

This case is slightly different from the situation posed in *Whiteley* in that here the original law-enforcement error leading to the arrest was a failure to record the recall of a warrant, rather than obtaining a warrant based on clearly inadequate information. But to the extent this difference is relevant, it makes this case a stronger one for suppression. In *Whiteley*, a warrant at least existed. Here, it did not. Accordingly, the erroneous report of the Dale County warrant clerk that led to a violation of petitioner's Fourth Amendment rights is not

moderated by the fact that the illegal arrest was conducted by another member of the law enforcement team.

Whiteley likewise renders irrelevant the fact, highlighted by the Eleventh Circuit, *see* Pet. App. 11a. that the failure of communication here involved not just more than one law enforcement officer but more than one law enforcement department. *Whiteley* itself involved police officers from different offices in different counties. Furthermore, this Court's cases have long recognized that collective knowledge crosses jurisdictional lines. Thus, while police in one jurisdiction are entitled to rely on information from another jurisdiction to make an arrest, the "admissibility" of evidence seized in reliance on representations from another department "turns on whether the officers who *issued* the ['wanted'] flyer possessed probable cause to make the arrest." *United States v. Hensley*, 469 U.S. 221, 231 (1985). Here, the Dale County Sheriff's Department lacked probable cause, since it had been affirmatively notified of the warrant's recall and had physically returned the recalled warrant to the court. Thus, its lack of probable cause taints the arrest ultimately conducted by Coffee County police officers who relied entirely on Dale County's inaccurate representations.

Nor can the Eleventh Circuit's decision be squared with this Court's rejection long ago of the "silver-platter doctrine." In *Elkins v. United States*, 364 U.S. 206, 223 (1960), this Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from -

unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." *See also* 1 Wayne R. LaFave, Search and Seizure § 1.5(c) (4th ed. 2004) (noting that "[t]here does not currently appear to be any dispute" about the rule in *Elkins*). The Court noted that refusing to admit unconstitutionally acquired evidence, even in these cooperative cases, served the central deterrent purposes of the exclusionary rule. *See* 364 U.S. at 217. The same is true in this case, which involves a federal prosecution predicated on an unconstitutional search conducted by state officers.

3. Backing away from the general principle that law enforcement is charged with collective knowledge would not only contravene settled Fourth Amendment precedent; it would also contradict this Court's approach to other areas of constitutional criminal procedure. For example, prosecutors are compelled under *Brady* to produce "evidence favorable to the accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (internal quotation omitted). The fact that an individual prosecutor is not himself personally aware of a particular piece of exculpatory or impeachment evidence does not relieve him of this duty – instead, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Such a collective knowledge approach is necessary because the agencies that are charged with the responsibilities of ferreting out and prosecuting crime are the entities best situated to

ensure full compliance with the law. Thus, charging individual prosecutors with knowledge of exculpatory information possessed by the police with respect to prosecutorial *Brady* obligations is appropriate because there is not "any serious doubt that procedures and regulations can be established . . . to insure communication of all relevant information on each case to every lawyer who deals with it." *Kyles*, 514 U.S. at 438 (internal quotation and citation omitted).

This Court has taken a similar position with respect to violations of *Edwards v. Arizona*, 451 U.S. 477 (1981), under the Fifth Amendment. In *Arizona v. Roberson*, 486 U.S. 675 (1988), for example, this Court attached "*no* significance" to the fact that the second officer who interrogated the defendant was unaware that he had invoked his right to counsel during a prior interrogation by another officer. *Id.* at 687 (emphasis added):

> [C]ustodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. . . . Whether a contemplated reinterrogation concerns the same or a different offense, *or whether the same or different law enforcement authorities are involved in the second investigation*, the same need to determine whether the suspect has requested counsel exists. The police department's failure to honor that request cannot be

> justified by the lack of diligence of a particular officer.

Id. at 687-88 (emphasis added).

Just as allowing *prosecutors* to disclaim collective knowledge to escape the requirements of *Brady* or permitting *interrogators* to disclaim collective knowledge to escape the requirements of *Edwards* would violate the rights of criminal defendants, so too would citizens' rights be violated by permitting arresting officers to disclaim collective knowledge about a court's decision to recall a previously issued warrant. Since police departments are obligated to respect the Fourth Amendment, it is fair and reasonable to expect them to establish procedures and regulations to insure communication of all relevant information regarding the status of a warrant to every officer who seeks to rely on that warrant. In this case, Alabama sheriff's departments maintained a system that led to the violation of petitioner's Fourth Amendment rights; application of the exclusionary rule will appropriately place the burden of compliance with the Fourth Amendment on the Alabama law enforcement community.

4. The facts of this case reinforce the conclusion that the errors of Dale County Sheriff's Office personnel are fairly chargeable to the officers who arrested petitioner. The record shows that the county sheriff's departments cooperate regularly and in this case coordinated their activities to execute this warrant. Moreover, the legal structure of law enforcement in Alabama confirms the unified nature of the law-enforcement process. Thus, because the Dale County Sheriff's Office was informed that the

warrant against petitioner had been recalled, that knowledge must be imputed to the officers who relied on that department's communications as the sole basis for their actions.

The warrant at issue in this case spent time in three separate counties in the two and a half months during which it was valid. *See supra* pp. 2-3. The repeated transfers in such a short period of time show that these Alabama sheriff's departments were involved in a concerted law-enforcement effort. The fact that the warrant could be so actively pursued and so assiduously followed by three separate counties for the brief time it was valid further underscores the importance of treating these counties as a single law enforcement entity.

Furthermore, Alabama law treats sheriff's departments not as separate county-level entities but as part of a statewide system. As this Court recognized in *McMillian v. Monroe County, Ala.*, 520 U.S. 781 (1997), an Alabama county sheriff, when executing his law enforcement duties, represents the State of Alabama, not his county. The Court pointed to a number of provisions of both the Alabama Constitution and the Alabama Code that showed that Alabama county sheriffs are part of a coordinated, statewide law enforcement enterprise, *see id.* at 786-93, and concluded that they should not be conceived of as county officials. Particularly in light of that conclusion, this Court should not allow one agent of that statewide enterprise to overcome the protections of the Fourth Amendment by relying on the erroneous information provided by another agent.

III. NOTHING ABOUT THE NATURE OF NEGLIGENT POLICE RECORDKEEPING JUSTIFIES CREATING AN EXCEPTION TO THE EXCLUSIONARY RULE.

Police officers are expected to make arrests and conduct searches when those activities might discover evidence of criminality that can be used in a prosecution. If illegal arrests and searches could produce such evidence, the police would have an obvious incentive to conduct them. *Elkins v. United States*, 364 U.S. 206, 217 (1960). Accordingly, as this Court has frequently explained, "the exclusionary rule was adopted to deter unlawful searches by police." *Illinois v. Gates*, 462 U.S. 213, 263, (1983) (White, J., concurring). Because evidence resulting from unlawful searches cannot be used to obtain a conviction, *Weeks v. United States*, 232 U.S. 383, 398 (1914), the exclusionary rule provides a powerful and essential counter-incentive for police to respect constitutional bounds.

The rationale for the exclusionary rule applies with full force to cases involving arrests and searches for which the sole basis is officers' reliance on outdated, inaccurate, and negligently maintained police records. If evidence seized pursuant to arrests based on inaccurate reports regarding the existence or status of a warrant could be used in criminal prosecutions, perverse and dangerous incentives would arise with respect to police recordkeeping procedures. Applying the exclusionary rule counteracts those incentives by refusing to allow law enforcement to profit from its own faulty recordkeeping. Indeed, particularly when it comes to

negligent recordkeeping, there are no effective alternatives to the exclusionary rule that can provide appropriate deterrence.

A. Permitting the Introduction of Evidence Obtained Because of Law Enforcement's Own Negligent Recordkeeping Would Create Perverse Incentives for Police Departments.

1. This case reflects a stark fact: only because the Dale County Sheriff's Department failed to keep accurate records regarding the status of warrants were police officers able to arrest, and search, petitioner. Police negligence, in short, enabled the discovery of evidence that would otherwise have been outside the reach of the police, who were familiar with petitioner (and indeed, had appeared at his house only a short time before the events at issue here).

If this Court were to allow the introduction of evidence unlawfully seized under these circumstances, it would send a message to police departments that they are entitled to rely on outdated, bloated warrant records as the basis for stopping, arresting, and searching individual citizens. This will afford police an attractive avenue to victory in the "often competitive enterprise of ferreting out crime." *Evans*, 514 U.S. at 15 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). And it will pose a significant threat to the privacy of countless individuals: The plaintiff in *Bowers v. Hardwick*, 478 U.S. 186 (1986), for example, was arrested while engaged in consensual sex in his own

bedroom by an officer who had come to serve a recalled warrant for failure to pay a fine.[11]

Individuals, in fact, are often temporarily subject to warrants, only to have those warrants recalled or quashed by a court. For example, fourteen percent of the arrest warrants processed by the federal Warrant Information Network in 2004 were dismissed by the court or returned unexecuted. U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004, at 16 (2006).[12] It is impossible to say with precision

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[11] When told by Mr. Hardwick that the warrant was no longer good because the ticket had already been paid, the arresting officer replied, "It doesn't matter, because I was acting under good faith." Peter Irons, The Courage of Their Convictions 395-96 (1988).

[12] *See also* Randall Guynes & Russell Wolff, Un-served Arrest Warrants: An Exploratory Study (2004), *available at* http://www.ilj.org/publications/FinalWarrantsReport.pdf (last visited May 7, 2008). This study, commissioned by the National Institute of Justice, looked, among other things, at all the warrants outstanding in a single county from March through August of 2001 and found that 184 warrants were "closed by countermand," *id.* at 15 – that is, "withdrawn by the court due to some legal error," *id.* at 16; another 278 warrants were "closed by return," a category that included warrants issued for failure to pay a fine that became "irrelevant" as a "result of the person paying the fine and court costs without having been arrested," *id.* Thus, in this one county, there were hundreds of warrants that could have caused unconstitutional arrests if police records failed to accurately reflect the status of warrants. An earlier study funded by the U.S. Congress' Office of Technology Assessment that examined a random sample of the warrants in the National Crime Information Center's "Wanted-Person System" found that 6.1 percent of the warrants on file had been cleared or vacated at least a year before the sample date. *See* Kenneth C. Laudon, *Data Quality and Due Process in*

how many such warrants still appear as active in police records, because neither federal nor state warrant databases have undergone recent public audits, but the available evidence is quite troubling.[13]

Providing effective incentives for law enforcement to maintain accurate records has also become more pressing because the number of cross-jurisdictional inquiries is increasing – and each inquiry potentially represents an unlawful arrest if the record system contains erroneous information. In FY 2005, the FBI reported that the number of

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Large Interorganizational Record System, Communications of the ACM, vol. 29 no.1, at 4, 8 (Jan. 1986), *available at* http://portal.acm.org/citation.cfm?id=5466&dl=ACM&coll=ACM & CFID=26953034&CFTOKEN=64772422 (last visited May 7, 2008).

[13] An older report from the U.S. Congress' Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy, OTA-CIT-296* (June 1986), reported that the FBI's audit of five states' records "indicated that an average of 5.5 percent of the NCIC wanted persons entries were invalid." *Id.* at 133-34. Alabama was one of the states included in this audit. *See* David Burnham, *F.B.I. Says 12,000 Faulty Reports on Suspects Are Issued Each Day*, N.Y. Times, Aug. 25, 1985, at 1 (also reporting that the F.B.I. projected 12,000 "invalid or inaccurate reports on suspects wanted for arrest" were being transmitted daily to federal, state, or local law enforcement agencies).

A more recent survey of related state-level databases containing criminal-history records reported in 2003 that 20 states had not been audited for data quality in the previous five years, and 22 reported that no audit was planned for the next three years. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2003, at 8 (2006).

transactions for the National Crime Information Center (which includes the Wanted Person database) was up by eighteen percent over FY 2004. Press Release, FBI, National Crime Information Center Sets New Record (Jan. 17, 2006), *available at* http://www.fbi.gov/pressrel/pressrel06/ncicrecord011706.htm (last visited May 7, 2008). Future increases in queries to various databases could dwarf the numbers seen so far, as automatic license plate recognition systems begin to be introduced in police departments around the country. Jacques Billeaud, *Infrared Cameras Help Police Scan for Trouble*, L.A. Times, Sept. 9, 2007, at B7. Such systems can visually scan and then check the records associated with seventy-five times more license plates than an officer would in a standard shift, *id.*, consequently exposing exponentially more citizens to the threat of an unlawful arrest.

2. The Eleventh Circuit's decision permitting the government to use the evidence in this case because the individual arresting officers were unaware either of the warrant's recall or of the flawed recordkeeping practices within the police department whose negligence led to the inaccurate report would give law enforcement a perverse incentive to structure its operations so as to leave officers in the field ignorant of the deficiencies in police record management. Evidence would certainly be suppressed if the officer were aware that a warrant were recalled and nevertheless conducted an arrest based on it. *Cf. Leon*, 468 U.S. at 923 (citing *Franks v. Delaware*, 483 U.S. 154 (1978) (suppression appropriate if affiant knew that information used to support warrant was false)). Evidence would presumably

also be suppressed if the arresting officer knew that a record-keeping system was improperly maintained, casting doubt on the accuracy of any report of a warrant and rendering reliance on it objectively unreasonable. *See Evans,* 514 U.S. at 17 (O'Connor, J., concurring); *cf. Leon*, 468 U.S. at 922. Therefore, to exploit the exception to the exclusionary rule adopted by the Eleventh Circuit, police departments would have an incentive to provide arresting officers with plausible deniability about inaccuracies in police records. Inhibiting communications between law enforcement agencies or even within a single police department is hardly a desirable outcome and can only lead to further errors in recordkeeping.

If the good faith of the actual arresting officer is all that is required to permit introduction of evidence seized during a search, this can create an intolerable incentive for police and police departments to organize themselves so as to manufacture such good faith. Police officers might be tempted to tell colleagues that a warrant was in force, when in fact, it had not yet even been sought, since their colleagues would then be entitled to act. *See, e.g., People v. Fields*, 785 P.2d 611, 612 (Colo. 1990) (parole officer entered warrant into NCIC database when warrant had not yet been applied for). Police might set up their databases to return indications that warrants exist not only for the individuals actually named in a warrant but also for individuals with similar names, in the hope that this would permit a broader range of searches to which exceptions to the exclusionary rule would apply. *See, e.g., United States v. Grayson*, 2006 U.S. Dist. LEXIS 44926 (N.D. Okla. June 30, 2006) (permitting

introduction of evidence found in warrantless search of Demario Grayson based on police database that automatically "linked" his name to a warrant issued for a different individual, Demarco Grayson). But this Court has consistently declared that it is unacceptable for law enforcement to deliberately evade a rule designed "to reduce the risk" of a constitutional violation. *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (internal quotation omitted) (noting that the facts in the case "reveal a police strategy adapted to undermine the *Miranda* warnings," *id.* at 616). Creating an exception to the exclusionary rule for warrantless searches when the search rests on inaccurate recordkeeping by law enforcement would invite just such evasions, as police departments might tailor their behavior to take full advantage of such a loophole.

3. Permitting the introduction of evidence obtained in searches like the one at issue here would undermine states' efforts to regulate their police departments. State high courts that have been presented with the question whether to exclude evidence unlawfully obtained as a result of inaccurate police recordkeeping have generally held that such evidence should be suppressed. And they have identified deterrence of negligent recordkeeping as the basis for requiring exclusion. *See, e.g., Hoay v. State*, 71 S.W.3d 573, 577 (Ark. 2002) ("If the touchstone of the exclusionary rule is deterrence of police misconduct, as *Leon* makes clear, that rule should apply equally to defective recordkeeping by law enforcement."); *People v. Willis*, 46 P.3d 898, 915 (Cal. 2002) ("[s]uppressing the fruits of an arrest made on a recalled warrant will deter further misuse

of the computerized criminal information systems and foster more diligent maintenance of accurate and current records") (quoting *People v. Ramirez*, 668 P.2d 761, 765 (Cal. 1983)); *Shadler v. State*, 761 So. 2d 279, 285 (Fla. 2000) ("if the exclusionary rule is not applied to evidence secured" due to law enforcement mistakes, state agencies will not "have an incentive to maintain records current and correct"); *State v. Allen*, 690 N.W.2d 582, 593 (Neb. 2005) ("[w]e conclude that the threat of exclusion is likely to cause police officers and dispatchers to exercise greater care").[14]

If this Court were to reject these states' approach, it would undercut that deterrence. Even in a state in which the state constitution, evidence code, or judicial policy continued to require that such evidence be suppressed, the federal government could use the evidence in a federal prosecution. But ever since *Elkins*, this Court has rejected the "silver platter doctrine," recognizing that "when a federal court . . . admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution." 364 U.S. at 221.

4. Finally, this Court should adhere to its longstanding conception of the exclusionary rule in

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[14] The only case holding to the contrary, *Harvey v. State*, 469 S.E.2d 176, 179 (Ga. 1996), held that the underlying arrest did not violate the Fourth Amendment in the first place. That court apparently did not recognize that *Whiteley* clearly rejects that position.

light of the potential for an even greater number of record-generated constitutional violations in the future. The problem of inaccurate police and law enforcement recordkeeping is already a significant issue, as the reported cases show.[15] These cases,

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[15] Inaccurate record-keeping by police departments frequently triggers stops, searches, and arrests. *E.g.*, *United States v. Gines-Perez*, 90 Fed. App'x 3 (1st Cir. 2004); *United States v. Williams*, No. 97-4849, 1998 WL 276460 (4th Cir. May 27, 1998); *United States v. Anderson*, No. 4:07cr0023, 2007 WL 4732033 (N.D. Ohio June 21, 2007); *United States v. Grayson*, No. 06-CR-0086, 2006 WL 1836004 (N.D. Okla. June 30, 2006); *United States v. Parker*, No. 99-CR-123, 1999 WL 997282 (E.D.N.Y. 1999); *Park v. Valverde*, 61 Cal. Rptr. 3d 895 (Cal. Ct. App. 2007); *People v. Fields*, 785 P.2d 611, 614 (Colo. 1990); *State v. White*, 660 So. 2d 664 (Fla. 1995); *Jibory v. City of Jacksonville*, 920 So. 2d 666 (Fla. Dist. Ct. App. 2005); *State v. Murphy*, 793 So. 2d 112 (Fla. Dist. Ct. App. 2001); *Best v. State*, 817 N.E.2d 685 (Ind. Ct. App. 2004); *Commonwealth v. Vaughn*, 117 S.W.3d 109 (Ky. Ct. App. 2003); *Ott v. State*, 600 A.2d 111, 117, 119 (Md. 1992); *State v. Diloreto*, 850 A.2d 1226 (N.J. 2004); *People v. McElhaney*, 552 N.Y.S.2d 825 (N.Y. Sup. Ct. 1990); *Joyner v. Taylor*, 968 S.W. 2d 847 (Tenn. Ct. App. 1997); *White v. State*, 989 S.W. 2d 108 (Tex. App. 1999); *State v. Mance*, 918 P.2d 527 (Wash. Ct. App. 1996); *State v. Williams*, 583 N.W. 2d 673 (Wis. Ct. App. 1998) (unpubl.).

There are also many cases in which the erroneous information is chargeable to the police, because the negligent record-keeper is an adjunct to the law enforcement team. *E.g.*, *People v. Willis*, 46 P.3d 898 (Cal. 2002); *People v. Ferguson*, 134 Cal. Rptr. 2d 705 (Cal. Ct. App. 2003); *People v. Spence*, 132 Cal. Rptr. 2d 621 (Cal. Ct. App. 2003) (unpubl.); *People v. Knight*, No. CO38928, 2002 WL 31372151 (Cal. Ct. App. Oct. 22, 2002) (unpubl.); *People v. Ridge*, 57 Cal. Rptr. 2d 255 (Cal. Ct. App. 1996) (unpubl.); *Shadler v. State*, 761 So. 2d 279 (Fla. 2000); *Austin v. State*, 965 So. 2d 853 (Fla. Dist. Ct. App. 2007); *Eldridge v. State*, 817 So.2d 884 (Fla. Dist. Ct. App. 2002); *State v. Sands*, 802 So. 2d 417 (Fla. Dist. Ct. App. 2001); *State v. Hisey*, 723 N.W. 2d 99 (Neb. Ct. App. 2006).

though numerous, undoubtedly represent only a small fraction of the unlawful searches actually taking place, as many such searches will produce no incriminating evidence – hardly a surprising result, given that the searches are based on warrants that have been recalled after a judicial officer has concluded that they were no longer necessary or appropriate – and many other searches will not produce reported opinions.

This Court should confirm that the exclusionary rule applies to evidence obtained as a result of negligent police recordkeeping errors just as it applies to evidence obtained as a result of other law enforcement illegalities. Such a holding would keep in place the appropriate incentive for law enforcement entities to improve their records management systems, thus striving to prevent unlawful arrests. When government agencies have an incentive to keep accurate records, they take steps to accomplish that goal. And if they do not do so, they certainly do not deserve to be rewarded. What apparently has been lacking with respect to some law enforcement databases is a strong incentive to accuracy, which this Court can now reaffirm.

B. No Alternative to Exclusion Can Produce Sufficient Incentives to Prevent Future Fourth Amendment Violations From the Use of Inaccurate Police Warrant Records.

Without any prompting from the government, the Eleventh Circuit *sua sponte* advanced five reasons why it thought that the exclusionary rule is unnecessary to deter negligent law-enforcement

recordkeeping. None of them stands up to scrutiny. Indeed, expanding the *Leon* and *Evans* exception to cover the police's own recordkeeping errors would effectively swallow the exclusionary rule.

1. The Eleventh Circuit first suggested that legal rules cannot deter negligence "because only if the decision maker considers the possible results of her actions can she be deterred." Pet. App. 10a. This is a bizarre suggestion. Much of the edifice of modern tort law is built upon the understanding that the prospect of future liability will provide incentives for regulated actors to take the appropriate level of care – that is, to behave non-negligently.

This Court's exclusionary rule jurisprudence likewise is predicated on the notion that an unlawful search, "whether deliberate or negligent, can produce nothing usable against the person aggrieved by the invasion." *Alderman v. United States*, 394 U.S. 165, 176 (1969); *accord Michigan v. Tucker*, 417 U.S. 433, 447 (1974) (noting that the exclusionary rule's deterrent force presupposes willful or negligent police conduct that can be altered by the incentives the rule creates).

This result makes perfect sense. As the state courts that have reviewed searches based on slipshod law-enforcement recordkeeping have recognized, *see supra*, pp. 38-39, the exclusionary rule provides a powerful incentive for maintaining accurate records – that is, for avoiding negligence.

To be sure, once the negligent recordkeeping has already occurred and led to incorrect information being reported to officers in the field, there may be no way of preventing a particular unconstitutional

arrest The arresting officers in this case believed that a valid warrant still existed and so they arrested petitioner. But the appropriate perspective from which to consider the deterrent effects of excluding evidence based on police department negligence is *ex ante*, not *ex post*.

Petitioner's unconstitutional arrest was the product of negligence somewhere within the law enforcement bureaucracy: the negligence of the sheriff's department in failing to establish proper procedures for accurate recordkeeping, or the negligence of an individual department employee who failed to correct the record when the warrant was recalled, or both. The conduct of the arresting officers further contributed to the constitutional violation. Despite petitioner's telling them that the purported arrest warrant was no longer active, *see* J.A. 63, the officers insisted on arresting him without waiting for the few minutes necessary to confirm the existence of an active warrant. Had the relevant sheriff's departments recognized ahead of time that evidence gained from arrests under the penumbra of a warrant long since recalled would be inadmissible at trial, that awareness could well have prompted them to maintain more accurate files (that is, to avoid negligent recordkeeping) in order to avoid wasting time on cases that would ultimately be dismissed once the discovered evidence was suppressed.

2. The court of appeals also suggested a possibility of reprimand or other discipline sufficient to ensure that police personnel keep records current. Pet. App. 10a. But internal discipline is always available for constitutional violations. Nothing in

the court of appeals' analysis even remotely explains why it should be sufficient for this form of police negligence when all other forms continue to be governed by the exclusionary rule.

In any event, the court of appeals failed to offer any factual support for its assertion that internal discipline might address the problem here, and common sense suggests the contrary. A department's incentives to discipline or reprimand negligent employees depend on their actions being something the department desires to deter. If employees' negligence leads to the discovery of admissible evidence that otherwise would be unavailable – as it will if this Court abandons the exclusionary rule for these cases – then departments engaged in the competitive enterprise of ferreting out crime might tacitly condone, rather than condemn, employee laxity. This will be particularly true if, as we show in the next subsection, there is little likelihood of civil liability either.

Moreover, as this case illustrates, there is a serious practical problem facing even departments inclined to reprimand or discipline negligent employees. At least to this point, the employee who failed to make the proper changes to Dale County's records has not been identified. Indeed, it is unclear whether he or she is even identifiable. How, then, can there be any discipline? The larger and more bureaucratic a department, the harder it may be to identify the responsible employee.

3. The court of appeals also asserted that the "possibility of civil liability" might provide an appropriate level of deterrence for sloppy

recordkeeping if "the failure to keep records updated results in illegal arrests or other injury." Pet. App. 10a. Once again, however, the same could be said of other Fourth Amendment violations based on other kinds of law enforcement errors. Yet the Eleventh Circuit offers no reason for treating recordkeeping errors leading to unconstitutional arrests and searches differently.

Indeed, whatever the merits of general arguments about civil liability for Fourth Amendment violations, sloppy recordkeeping cases are a *particularly* unlikely candidate for using 42 U.S.C. § 1983 damages suits to deter unconstitutional conduct.

As we have already explained, it will often be extremely difficult for an aggrieved individual even to detect who is responsible for the crucial error. When there are "many different people who have access to these warrants," J.A. 60, identifying the person who omitted to update the records will be impractical. And there may be a serious question of causation: can a records clerk who failed to update a record in February be held personally responsible for an arrest carried out in July given the number of intervening actors and events? Can such a clerk even be said to have violated a § 1983 plaintiff's constitutional rights?

Ultimately, the sheriff is responsible for failing to establish and enforce adequate recordkeeping procedures. But in a state like Alabama, he cannot be held accountable in his official capacity, since he is considered a state policymaker, and therefore not amenable to suit under § 1983. *See McMillian*, 520

U.S. at 783 (affirming dismissal of § 1983 suit against county for sheriff's actions in suppressing exculpatory evidence with regard to criminal defendant).

As for the arresting officers, their belief in the existence of a valid warrant will almost certainly provide them with qualified immunity, despite the undoubted constitutional violation. *See, e.g.*, *Wilson v. City of Boston*, 421 F.3d 45 (1st Cir. 2005); *Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992); *v. Bzdel*, 214 F. Supp.2d 69, 74-76 (D. Mass. 2002); *Lauer v. Dahlberg*, 717 F. Supp. 612, 613 (N.D. Ill. 1989); *aff'd*, 907 F.2d 152 (7th Cir. 1990); *see also Mitchell v. Aluisi*, 872 F.2d 577 (4th Cir. 1989) (addressing a due process claim, not a Fourth Amendment claim); *Mason v. Village of Babylon*, 124 F. Supp. 2d 807, 815 (E.D.N.Y. 2000) (same).[16] Unless and until it becomes clear to them that a particular department's records are consistently inaccurate, both they, and the departments that employ them, will remain insulated from liability, and thus from the deterrence that civil liability provides.

4. The court of appeals also asserted, again without any support, that departments face strong incentives to maintain timely records because

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[16] It would be difficult for a defendant in an individual criminal proceeding to ascertain the internal recordkeeping procedures of the arresting agency and establish that the recordkeeping system had a sufficiently well-known history of errors to render reliance on it by the arresting officer objectively unreasonable. And the burden of conducting discovery and litigation over this issue at every such suppression hearing could be substantial.

"inaccurate and outdated information is just as likely, if not more likely, to hinder police investigations as it is to aid them." Pet. App. 10a. But this case shows why that hypothesis is debatable, at best, particularly when it comes to records indicating that an individual is the subject of an arrest warrant. The presence of stale arrest warrants within a police department's files imposes no obligation on a department. Police departments face no enforceable duty to pursue every warrant vigorously. After all, for the six months between January and July 2004, neither the Dale County nor the Coffee County sheriff's departments made any effort to execute the warrant ostensibly still in the Dale County department's files, despite the fact that petitioner was well known to local law-enforcement officials, who were able to locate him at his house. *See* J.A. 64-65. But when Investigator Anderson decided he wanted to confront petitioner, the long-dormant warrant provided a basis for an otherwise unjustifiable arrest and search. The purpose of the exclusionary rule is to deny law enforcement any benefit from this sort of unjustified action.

5. Finally, the court of appeals suggested that deterrence is unlikely to work when "the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of negligent recordkeeping, but instead it would scuttle a case brought by officers of a different department in a different county." Pet. App. 11a. This suggestion is particularly puzzling: after all, this is a *federal* prosecution, and the United States was involved in neither the negligent recordkeeping nor the unconstitutional arrest.

In any event, as we have already explained, *supra* pp. 25, 28-29, the Eleventh Circuit's decision cannot be squared with this Court's rejection of the "silver-platter doctrine." and the court of appeals provided no argument for revisiting the well-established principle that federal prosecutors cannot use evidence obtained unconstitutionally by state or local police, which serves the deterrent purposes of the exclusionary rule. *See Elkins v. United States*, 364 U.S. at 217.

* * *

Applying the exclusionary rule is appropriate and necessary here, where police failed to heed the directive of a court, months earlier, to disregard a now-invalid warrant. This Court's precedents demonstrate that this law enforcement misconduct should be deterred by suppressing the resulting evidence, so as to preserve the liberty and privacy guaranteed to all citizens by the Fourth Amendment. Choosing instead to expand the *Leon-Evans* exception to allow law enforcement to benefit from its own negligence would be to embark on a dangerous path, creating unwise incentives for police and inviting disregard for the Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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RESPONDENT'S BRIEF

101

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In the Supreme Court of the United States

BENNIE DEAN HERRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule applies when a police officer makes an arrest after receiving information from a different law enforcement agency that an outstanding warrant exists, and that information was incorrect because of a negligent error by that agency in failing to remove the warrant from its files.

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Black's Law Dictionary (8th ed. 2004) 22

Peter M. Brien, U.S. Dep't of Justice, Improving Access to and Integrity of Criminal History Records (July 2005) <http://www.ojp.usdoj.gov/bjs/pub/pdf/iaichr.pdf> 47

Bureau of Justice Statistics, U.S. Dep't of Justice:

Improving Access to and Integrity of Criminal History Records (July 2005) <http://www.ojp.usdoj.gov/bjs/pub/pdf/iaichr.pdf> 47

Improving Criminal History Records for Background Checks: National Criminal Improvement program (NCHIP) (May 2003) <http://www.ojp.gov/bjs/pub/pdf/ichrbc.pdf> ... 47

National Criminal History Improvement Program (last modified May 21, 2008) <http://www. ojp.usdoj.gov/bjs/nchip.htm> 47

Survey of State Criminal History Information Systems, 2003 (Feb. 2006) <http:www.ojp.usdoj.gov/bjs/pub/pdf/sschis03.pdf> 47

Use and Management of Criminal History Record Information: A Comprehensive Report 2001 Update (Dec. 2001) <http://www.ojp.usdoj.gov/bjs/abstract/umchri01.htm> 47

Miscellaneous—Continued: Page

Congress of the United States, Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy* (June 1986) 47

40 Fed. Reg. 22,114- 22,115 (1975) 48

Kenneth C. Laudon, *Data Quality and Due Process in Large Interorganizational Record System*, Communications of the ACM, Vol. 29, No. 1 (Jan. 1986) 47

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Secretary's Advisory Comm. on Automated Personal Data Systems, Dep't of Health, Educ. & Welfare, *Records, Computers and the Rights of Citizens* (July 1973) 47

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In the Supreme Court of the United States

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v.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 492 F.3d 1212. The opinion of the district court (Pet. App. 13a-18a) is reported at 451 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2007. The petition for a writ of certiorari was filed on October 11, 2007, and granted on February 19, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search-

es and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1), and possessing methamphetamine, in violation of 21 U.S.C. 844(a). He was sentenced to 27 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-12a.

1. On July 7, 2004, Investigator Mark Anderson of the Coffee County Sheriff's Department was told by another officer that petitioner was retrieving property from an impounded vehicle at the Sheriff's Department. Pet. App. 2a, 13a-14a; J.A. 17. Investigator Anderson, who knew petitioner and had been told by another officer that there was an outstanding warrant for petitioner's arrest, asked warrant clerk Sandy Pope to check the Coffee County Sheriff's Department's internal records. Pet. App. 2a; J.A. 16, 18. When Pope reported that there were no active warrants in Coffee County, Investigator Anderson asked her to check with neighboring Dale County. Pet. App. 2a. Pope telephoned the Dale County Sheriff's Department, and was told by its warrant clerk, Sharon Morgan, that a check of an in-office database maintained by the Dale County Sheriff's Department showed an active warrant for petitioner's arrest on charges of failure to appear on a felony charge. *Ibid.* Pope relayed the information to Investigator Anderson and asked Morgan to fax her a copy of the warrant. *Id.* at 2a, 14a; J.A. 34-35, 40-41.

Investigator Anderson and Deputy Neil Bradley immediately left the station to pursue petitioner, who was already leaving in a pickup truck. Pet. App. 2a; J.A 19-20. The officers pulled over petitioner's truck less than a mile from the Coffee County Sheriff's Department and placed him under arrest. Pet. App. 2a; J.A. 25. In petitioner's pocket, the officers found methamphetamine. Pet. App. 14a. Under the pickup's front seat, they found a handgun. *Id.* at 3a.

Meanwhile, Dale County warrant clerk Morgan unsuccessfully attempted to locate a copy of the warrant for petitioner's arrest. Pet. App. 3a. The Dale County Sheriff's Department and the Dale County Clerk's Office do not share a computer network, J.A. 45, 55, so Morgan called the Dale County Clerk's Office, and was told that the warrant had been recalled. Pet. App. 3a, 14a. Morgan "immediately" called Coffee County warrant clerk Pope, who relayed the information to Investigator Anderson and Deputy Bradley. *Id.* at 3a; J.A. 42. By that point, however, the officers had already arrested petitioner and searched his person and the pickup. Pet. App. 3a. Between 10 and 15 minutes elapsed between the time Dale County warrant clerk Morgan told Coffee County warrant clerk Pope that there was an active warrant for petitioner's arrest and when Morgan called back with the correct information. *Ibid.*

At the time of the suppression hearing in this case, Investigator Anderson had been a police officer for 16 years, J.A. 15, and Coffee County warrant clerk Pope had been at her job for five years, J.A. 32. Coffee County and Dale County are adjacent to one another, J.A. 27, and Anderson and Pope both testified that they had previously relied on information from Dale County about warrants. J.A. 26-27, 32. Anderson and Pope further testified that, before petitioner's arrest, they had never had cause to question any

information they received from Dale County. J.A. 16, 27, 33.

2. a. Petitioner moved to suppress the physical evidence against him on the ground that it was the fruit of an unlawful arrest. Pet. App. 3a.[1] After holding a suppression hearing, a magistrate judge recommended that petitioner's motion be denied in relevant part. J.A. 66-72. The magistrate judge specifically found that Investigator Anderson and Deputy Bradley "acted in good faith when they stopped and arrested [petitioner] based on the representations of the warrant clerks that there was an active outstanding felony warrant for [petitioner] in Dale County." J.A. 70.

b. The district court held a supplemental hearing, and issued an opinion adopting the magistrate judge's recommendation. Pet. App. 13a-18a.[2] The district court found

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[1] After being pulled over, petitioner exited his truck and walked towards the officers, at which point Deputy Bradley stated that petitioner was under arrest. J.A. 20. Petitioner then turned and started walking back towards his truck, but he was stopped by Investigator Anderson. J.A. 20. The search of petitioner's truck occurred after petitioner had been handcuffed and placed in the officers' car. J.A. 20-22.

On October 7, 2008, this Court will hear argument in *Arizona* v. *Gant*, No. 07-542, which presents the following question: "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?" Petitioner has not made a separate challenge to the search of his vehicle at any point during this litigation, including in his brief on the merits in this Court, which was filed more than two months after the Court granted certiorari in *Gant*.

[2] At the initial suppression hearing, Dale County warrant clerk Morgan answered "[s]everal times" when asked "how many times have you had or has Dale County had problems, any problems with communicat[ing] about warrants." J.A. 42. At the supplemental

that, when a warrant has been recalled, Dale County warrant clerk Morgan will "[n]ormally" receive a phone call from either the Dale County Clerk's Office or a judge's chambers, enter that information in the Dale County Sheriff's Department's computer system, and dispose of the physical copy of the warrant. *Id.* at 14a-15a; J.A. 54-55, 60. In this case, although the recalled warrant had been returned to the Dale County Clerk's Office, the Dale County Sheriff's Department's records did not reflect that fact. Pet. App. 15a. The district court accepted the testimony of Dale County warrant clerk Morgan that "the mistake was probably the fault of the Dale County Sheriff's Department, not that of the Dale County Clerk's Office." *Ibid.*

The district court determined that this Court's decision in *Arizona* v. *Evans*, 514 U.S. 1 (1995), which recognized an exception to the exclusionary rule for arrests that occur as a result of erroneous computer records kept by court employees, should be extended to cover similar mistakes by law enforcement personnel so long as there is a "mechanism to ensure [the recordkeeping's] system accuracy over time" and there is no evidence that "the system 'routinely leads to false arrests.'" Pet. App. 17a (brackets in original) (quoting *Evans*, 514 U.S. at 17 (O'Connor, J., concurring)). In this case, the district court found that "the mistake was

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hearing, Morgan denied having made that statement, and stated: "I have never, that I can immediately remember ever had any problem with communication whatsoever between Coffee County Sheriff's Office, Sandy [Pope], and myself." J.A. 61-62. After reviewing the court reporter's tape, the district court concluded that Morgan's statements were "confusing and essentially unhelpful" because "it is unclear whether Morgan and her questioner were talking about communication problems between the Dale County Sheriff's Department and the Coffee County Sheriff's Department or between the Dale County Sheriff's Department and the Dale County Clerk's Office." Pet. App. 17a-18a.

discovered and corrected within ten to 15 minutes," that there was "no credible evidence of routine problems with disposing of recalled warrants," and that the recordkeeping systems of both the Dale County Clerk's Office and the Dale County Sheriff's Department "were, and are, 'reliable.' " *Id.* at 17a-18a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court concluded that "the searches violated [petitioner's] Fourth Amendment rights," because petitioner's arrest had not been supported by probable cause or a warrant. *Id.* at 5a. But the court also stated that "whether to apply the exclusionary rule is 'an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Ibid.* (brackets in original) (quoting *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983))). Applying the framework developed in *Leon* and *Evans*, the court of appeals determined that suppression is not warranted unless there was "misconduct by the police or by adjuncts to the law enforcement team," "application of the [exclusionary] rule [will] result in appreciable deterrence of that misconduct," and "the benefits of the rule's application [will] not [be] outweigh[ed by] its costs." *Id.* at 9a.

As for the first condition, the court of appeals determined that "[t]he conduct in question" was the failure of an unidentified person in the Dale County Sheriff's Department "to record in that department's records the fact that the arrest warrant for [petitioner] had been recalled or rescinded." Pet. App. 9a. The court described that conduct as "at the very least negligent," and it "assume[d] for present purposes that the negligent actor * * * is an adjunct to law enforcement in Dale County and is to be treated for

purposes of the exclusionary rule as a police officer." *Ibid.* (citation omitted).

Turning to the second issue, the court of appeals concluded that applying the exclusionary rule in "these circumstances * * * will not deter bad record keeping to any appreciable extent, if at all." Pet. App. 10a. The court stated that "[d]eterrents work best where the targeted conduct results from conscious decision making," but here "[t]here is no reason to believe that anyone in the Dale County Sheriff's Office weighed the possible ramifications of being negligent and decided to be careless in record keeping." *Ibid.* The court of appeals also observed "that there are already abundant incentives for keeping records current," including "the inherent value of accurate record-keeping to effective police investigation," "the possibility of reprimand or other job discipline for carelessness," "the possibility of civil liability," and the "risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result." *Id.* at 10a-11a. In addition, the court of appeals emphasized "the unique circumstance here that the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of the negligent record keeping, but instead it would scuttle a case brought by officers of a different department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness." *Id.* at 11a.

Finally, the court of appeals determined that "any minimal deterrence that might result from applying the exclusionary rule in these circumstances would not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence." Pet. App. 11a-12a. The court of appeals emphasized, however, "that the test for reasonable police conduct is objective," and that "[i]f faulty record-

keeping were to become endemic in [Dale County], * * * officers in Coffee County might have a difficult time establishing that their reliance on records from their neighboring county was objectively reasonable." *Id.* at 12a.

SUMMARY OF ARGUMENT

The exclusionary rule generates substantial social costs by preventing factfinders from hearing what is often highly probative and inherently reliable evidence. Accordingly, the Court has carefully limited the rule's application to situations where the deterrent purposes that it is designed to serve will be appreciably furthered and where the benefits of suppression outweigh its sizeable costs. Under those principles, suppression is not warranted when police officers in the field make an arrest in objectively reasonable reliance on a statement by another law enforcement agency that there is a warrant for someone's arrest, where that statement was erroneous because of a negligent error in recordkeeping by an employee of that other law enforcement agency.

This Court has previously declined to apply the exclusionary rule where an arresting officer acts in good-faith reliance on information received from magistrates or court employees or on statutes enacted by legislatures. The Court has emphasized that the exclusionary rule is not designed—and should not be deployed—to deter objectively reasonable conduct. The Court has also recognized that police officers in the field must be allowed to rely on information they receive from others when it is reasonable to do so. In this case, there is no basis to conclude that the arresting officers acted unreasonably in relying on the report that there was an outstanding warrant for petitioner's arrest. Rather, the record refutes any suggestion that the officers had any objective basis to question the information

they received. Accordingly, suppression cannot be justified by an interest in deterring future officers in their position.

Nor can suppression be justified by the interest in deterring negligent mistakes in recordkeeping by police employees. This case involves a clerical employee's isolated failure to act diligently rather than the sort of intentional or flagrantly abusive police conduct for which the exclusionary rule was originally designed. Police departments and their employees already have ample built-in incentives to keep accurate records. Arrests based on recalled warrants would ordinarily squander scarce police resources and risk the ire of the citizenry. Failure to keep accurate records could potentially subject both a police department and its employees to civil liability, especially were they to engage in the sort of deliberately shoddy recordkeeping hypothesized by petitioner. Any incremental deterrence would be particularly attenuated and indirect here, because the employee who made the negligent error and the officers who made the arrest work for entirely different police departments. And even if suppression would result in some conceivable deterrence benefits, those benefits cannot outweigh the societal costs where bad faith is not at issue and the arrest occurred despite the best efforts of everyone directly involved to discover the truth.

The fact that the clerical employee who made the negligent recordkeeping error at issue here works for the Dale County Sheriff's Department, rather than a court, see *Arizona* v. *Evans*, 514 U.S. 1 (1995), does not justify a different result. Although this Court has repeatedly stated that the purpose of the exclusionary rule is to deter the police rather than other actors in the criminal justice system, it has never held that suppression is warranted *whenever* a Fourth Amendment violation is attributable to the actions of any-

one who works for a police department, even a clerical employee.

This case affords no opportunity to consider whether the exclusionary rule should be modified in situations involving large-scale information systems that are accessible by multiple law enforcement agencies. No such information system is at issue here. The creation of a computer database by the Dale County Sheriff's Department for in-office use did not amplify the effects of the recordkeeping error that led to petitioner's arrest; the result would have been the same if the records were handwritten on file cards kept in a steel box. The district court heard no evidence and made no findings about the sorts of massive data systems discussed by petitioner and his amici, and even their limited presentations about such systems are misleading and incomplete.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT SUPPRESSION IS NOT WARRANTED IN THIS CASE

The issue in this case is whether the exclusionary rule should be applied to suppress physical evidence obtained when a police officer makes an arrest after receiving information from a different law enforcement agency about an outstanding warrant, where the information was incorrect because of a negligent error by an employee of that other agency.[3] This Court's decisions make clear that the exclusionary rule is a remedy designed to deter future Fourth

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[3] This case has been litigated on the assumption that the question is whether the exclusionary rule may properly be applied in the circumstances presented here; the government has not contended that petitioner's arrest was constitutional. Br. in Opp. 7-25. The Court should "take the case as it comes to [it]." *United States* v. *Leon*, 468 U.S. 897, 905 (1984); accord *Arizona* v. *Evans*, 514 U.S. 1, 6 n.1 (1995).

Amendment violations rather than to vindicate rights that have already been violated. Accordingly, it should be applied only when doing so will have tangible benefits that outweigh the rule's substantial social costs. Neither criterion is satisfied here.

A. This Court Has Limited Application Of The Exclusionary Rule To Situations Where It Is Most Likely To Accomplish Its Remedial Aims Without Imposing Undue Costs

1. The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. The Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995), and this Court has "emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution," *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 362 (1998). "The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself," and "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (quoting *United States* v. *Calandra*, 414 U.S. 338, 354 (1974)).

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights." *Leon*, 468 U.S. at 906 (citation omitted). "[T]he rule is prudential rather than constitutionally mandated." *Scott*, 524 U.S. at 363. Its purpose is not to "cure the invasion of the defendant's rights which he has already suffered," *Leon*, 468 U.S. at 906 (citation omitted), but to prevent "future violations

of Fourth Amendment rights through the rule's general deterrent effect," *Evans*, 514 U.S. at 10; see *Elkins* v. *United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair.").[4] Accordingly, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983).

The Court has repeatedly cautioned against the "reflexive," *Evans*, 514 U.S. at 13, or "[i]ndiscriminate," *Leon*, 468 U.S. at 908, application of the exclusionary rule. "[T]he exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons," *Calandra*, 414 U.S. at 348, and "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence," *Hudson* v. *Michigan*, 547 U.S. 586, 592 (2006). Rather, "[a]s with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. In particular, the Court has repeatedly stated that an exclusionary remedy is "clearly * * * unwarranted" unless its application will

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[4] In earlier cases, the Court suggested that the exclusionary rule is also justified by principles of "judicial integrity." *Terry* v. *Ohio*, 392 U.S. 1, 12 (1968); *Elkins*, 364 U.S. at 222-223. The Court has since explained, however, that those principles require "essentially the same [inquiry] as the inquiry into whether exclusion would serve a deterrent purpose," *United States* v. *Janis*, 428 U.S. 433, 459 n.35 (1976), and that the judicial integrity rationale does not furnish "an independent basis for excluding challenged evidence," *Michigan* v. *Tucker*, 417 U.S. 433, 450 n.25 (1974). See *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *Calandra*, 414 U.S. at 355-356 & n.11.

"result in appreciable deterrence" beyond that provided by other mechanisms for preventing Fourth Amendment violations. *United States* v. *Janis*, 428 U.S. 433, 454 (1976); see *Hudson*, 547 U.S. at 597-599; *Evans*, 514 U.S. at 11; *Leon*, 468 at 900.

At the same time, the Court has cautioned that suppression is not warranted *simply* because applying the exclusionary rule in a particular situation would provide some incremental deterrence of Fourth Amendment violations. See *Scott*, 524 U.S. at 368 ("We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."); see also *Hudson*, 547 U.S. at 596; *Leon*, 468 U.S. at 910; *Calandra*, 414 U.S. at 350. The Court has recognized the compelling "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). Exclusion of inherently reliable and often highly probative evidence is an "extreme sanction," *Leon*, 468 U.S. at 916, that "exacts a costly toll upon the ability of courts to ascertain the truth," *United States* v. *Payner*, 447 U.S. 727, 734 (1980), and risks "setting the guilty free and the dangerous at large," *Hudson*, 547 U.S. at 591. In addition, because "[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice," the exclusionary rule can "generat[e] disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U.S. 465, 490 (1976).

As a result, "[s]uppression of evidence * * * has always been [a] last resort, not [a] first impulse," *Hudson*, 547 U.S. at 591, and any "possible benefit" of applying the exclusionary rule in a given situation "must be weighed

against the 'substantial social costs' exacted by" doing so, *Illinois* v. *Krull*, 480 U.S. 340, 352 (1987) (quoting *Leon*, 468 U.S. at 907); cf. *United States* v. *Patane*, 542 U.S. 630, 645 (2004) (Kennedy, J., concurring) (in Fifth Amendment context, concluding that "[i]n light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation").

2. In several contexts, this Court has held that the exclusionary rule should not be applied where an arresting officer acts in objectively reasonable reliance on decisions of, or information received from, official actors other than fellow police officers. In *Leon*, the Court concluded "that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 468 U.S. at 922. After determining that exclusion could not be justified by "its behavioral effects on judges and magistrates," *id.* at 916; see *id.* at 916-917, the Court rejected as "speculative" various arguments that suppression would "alter the behavior of individual law enforcement officers or the policies of their departments," *id.* at 918. The Court stated that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity," *id.* at 919, and it explained that mandating suppression in such circumstances "can in no way affect [an officer's] future conduct unless it is to make him less willing to do his duty," *id.* at 919-920 (citation omitted).

In *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), the Court applied the good-faith exception recognized in *Leon* to a search warrant that had not sufficiently described the items to be seized. The Court explained that the arresting

officers had taken "every step that could reasonably be expected of them" by preparing a warrant affidavit, presenting it to a neutral judge, and relying on the judge's assurances that the resulting warrant authorized them to conduct the search for which they had requested permission in the affidavit. *Id.* at 989-991. The Court noted that "it was the judge, not the police officers, who made the critical mistake," *id.* at 990, and stated that the "exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges," *ibid.* (citation omitted).

In *Krull*, the Court held that the exclusionary rule should not be applied where police officers conduct a search in reasonable reliance on a statute that purports to authorize such searches but is later declared unconstitutional. 480 U.S. at 349-361. The Court began by considering the effect of suppression on the arresting officer. It concluded that, because "an officer cannot be expected to question the judgment of the legislature" unless a statute is "clearly unconstitutional," mandating suppression when an officer reasonably relies on a statute "will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 349-350. The Court also stated that the exclusionary rule was not designed to deter legislators from enacting unconstitutional statutes, *id.* at 350, and that no evidence indicated that suppression would significantly deter the actions of legislators, *id.* at 351-352.

Finally, in *Evans*, this Court applied the same analysis to evidence seized by a police officer who had acted in reliance on an erroneous entry in a police computer system indicating that there was an outstanding warrant for the defendant's arrest. 514 U.S. at 3-4, 14-16. Assuming for purposes of its decision that "the erroneous information

resulted from an error committed by an employee of the office of the Clerk of Court," *id.* at 4, the Court concluded that "the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction," *id.* at 14. The Court explained that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees," and it noted that the party seeking exclusion had "offer[ed] no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among th[o]se actors require[d] the extreme sanction of exclusion," *id.* at 14-15. The Court also concluded that application of the exclusionary rule "could not be expected to alter the behavior of the arresting officer," because nothing indicated that he did not act "objectively reasonably when he relied upon the police computer record." *Id.* at 15-16. To the contrary, the Court agreed with the district court's assessment that the arresting officer had been "bound to arrest" and "would [have been] derelict in his duty if he failed to arrest." *Ibid.* (citation omitted; brackets in original).

B. Suppression Is Not Warranted Here

1. The arresting officers could not, and should not have, been deterred

This case does not involve "any disputed issues of fact regarding the arrest and search." Pet. 19. Investigator Anderson saw petitioner, a person he knew, at the Coffee County Sheriff's Department. Pet. App. 2a. Although Investigator Anderson "had reason to suspect that there might be an outstanding warrant for [petitioner's] arrest," he neither confronted petitioner nor detained him immediately. *Ibid.* Instead, Investigator Anderson asked Coffee County warrant clerk Pope to check the Coffee County records. *Ibid.* When Pope reported that there were no

outstanding warrants in Coffee County, Anderson asked her to call her counterpart in Dale County. *Ibid.* Pope spoke with Dale County warrant clerk Morgan, who told her that there was an outstanding warrant for petitioner's arrest in that county. *Ibid.* Pope then relayed the information to Anderson, who "[a]ct[ed] quickly" to pursue petitioner as he departed from the Coffee County Sheriff's Department, and, along with Deputy Bradley, arrested petitioner minutes later and before the officers or anyone else in the Coffee County Sheriff's Department learned that the warrant had been recalled. *Id.* at 1a-3a.

This Court has recognized that it is generally reasonable for police officers to rely on information received from dispatchers and other officers. *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965). And here, as in *Evans*, "[t]here is no indication that the arresting officer[s] [were] not acting objectively reasonably when [they] relied upon" the information they had received. 514 U.S. at 15-16; see *id.* at 17 (O'Connor, J., concurring). Investigator Anderson specifically testified that, although Coffee County and Dale County are adjacent to one another and relying on information from Dale County was "just something that we do," he had never previously in his sixteen years in law enforcement had cause "to question a Dale County warrant" or "to question information coming out of Dale County." J.A. 27; see J.A. 16.[5]

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[5] Petitioner asserts (Br. 47 n.16) that "[i]t would be difficult for a defendant in an individual criminal proceeding to ascertain the internal recordkeeping procedures of the arresting agency and establish that the recordkeeping system had a sufficiently well-known history of errors to render reliance on it by the arresting officer objectively unreasonable." Nothing precludes a defendant, however, from asking the arresting officers about their knowledge of recordkeeping errors or from questioning warrant clerks about the rate of errors in the relevant

Nor is there anything about this particular case that should have led the arresting officers to question the reliability of the information they had received from Dale County. Dale County warrant clerk Morgan stated unequivocally that there was a warrant for petitioner's arrest, and that report was consistent with what Investigator Anderson had previously been told by another officer. J.A. 18. Petitioner claims that he himself "explained [to the arresting officers] that he had recently seen the Dale County Circuit Judge and that no such warrant existed," Pet. Br. 5; see *id.* at 44, but self-serving assertions by suspects are both common and easy to make, and this Court has recognized that police officers in the field are not required to credit or investigate a suspect's protestations of innocence before proceeding in a manner that would otherwise be justified. *Baker* v. *McCollan*, 443 U.S. 137, 145-146 (1979); see *United States* v. *Grubbs*, 547 U.S. 90, 98-99 (2006) (stating that the Fourth Amendment does not require an "executing officer * * * [to] present [a] property owner with a

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system. Indeed, the government elicited that information here. J.A. 27, 33, 46, 61-62. This Court in *Evans*, moreover, seemingly contemplated that a showing could have been made that an officer's reliance on a court record system was unreasonable, 514 U.S. at 15-16, and Justice O'Connor's concurrence explicitly stated that "it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests," *id.* at 17 (O'Connor, J., concurring). This Court thus envisioned the feasibility of proving objective unreasonableness based on systemic problems in a recordkeeping system. In any event, there is no evidence of any systemic problems with regard to the recordkeeping system in this case, and to the extent that building a record of systemic problems may be difficult in a single criminal case, that point underscores that such issues would be better addressed through a civil action, with its more wide-ranging discovery, than through a suppression motion.

copy of the warrant before conducting his search" and does not grant "property owners * * * license to engage the police in a debate over the basis for the warrant"); *Curley* v. *Village of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) ("the arresting officer does not have to prove [an arrestee's] version wrong before arresting him").

The exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919. Here, Investigator Anderson and Deputy Bradley "took every step that could reasonably be expected of them," *Sheppard*, 468 U.S. at 989, and did what reasonable officers would have done under the circumstances. As in *Evans*, they "[were] bound to arrest" and "would [have been] derelict in [their] duty if [they] failed to arrest." 514 U.S. at 15 (citation omitted). Suppressing the evidence seized from petitioner's person and truck "can in no way affect [arresting officers'] future conduct unless it is to make [them] less willing to do [their] duty." *Leon*, 468 U.S. at 920 (citation omitted).

2. Suppression is not warranted in order to deter other police employees

For the reasons explained in the previous section, application of the exclusionary rule in the circumstances presented here cannot be justified by an interest in "alter[ing] the behavior of the arresting officer." *Evans*, 514 U.S. at 15. Accordingly, the question becomes whether "the exclusion of evidence at trial would * * * sufficiently deter future errors" by other persons "so as to warrant such a severe sanction." *Id.* at 14. The answer is no.

a. "In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred." *Janis*, 428 U.S. at 448. Here, the evidence reflects that the recordkeeping error was an isolated mistake, rather than

the result of a systemic inattention to the need to to maintain accurate databases. To the extent, therefore, that suppression would be designed to send a message to policymakers to improve their systems and training of personnel, nothing in this case suggests anything more than a single instance of human error by an employee. Accordingly, the only person the exclusionary rule could reasonably be intended to deter is that unknown individual in the Dale County Sheriff's Department who negligently failed to update that Department's records to reflect the recall of the warrant for petitioner's arrest.

Suppression would not—and should not be expected to—deter a person in the position of Coffee County warrant clerk Pope, who testified that in five years she had "[n]ever" previously "had a reason to doubt information that came from Dale County." J.A. 33. Nor would suppression be appropriate to deter a person in the position of Dale County warrant clerk Morgan, because the district court expressly found that "there is no credible evidence of routine problems with disposing of recalled warrants" in Dale County, and that the Dale County Sheriff's Department's recordkeeping system was "reliable." Pet. App. 17a-18a; cf. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment) (noting that the case before the Court did not involve "any demonstrated pattern of knock-and-announce violations").[6]

b. Fourth Amendment violations vary considerably in both their severity and their amenability to deterrence. "[T]he deterrent value of the exclusionary rule is most

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[6] Petitioner has not challenged "the objective reasonableness" of the actions of any officers "who originally obtained [the later recalled warrant for petitioner's arrest] or who provided information material to the probable-cause determination," *Leon*, 468 U.S. at 923 n.24, so there is no need to consider deterrence with respect to them.

likely to be effective" in situations where a violation of the Fourth Amendment is "flagrantly abusive," *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J. concurring in part), or "substantial and deliberate," *Franks* v. *Delaware*, 438 U.S. 154, 174 (1978). The converse is also true: the "extreme sanction" of exclusion (*Leon*, 468 U.S. at 916) is both less necessary and less appropriate in situations, like this one, that involve only "a negligent failure to act." Pet. App. 10a.

Petitioner is of course correct (Br. 43) that even negligent conduct is *capable* of being deterred to a point and that "[m]uch of the edifice of modern tort law is built upon the understanding that the prospect of future liability will provide incentives for regulated actors to take the appropriate level of care." But that same body of law recognizes that certain kinds of conduct—most notably, deliberate violations of another's rights or reckless wrongdoing—may require greater deterrents than a negligent and apparently isolated mistake. For example, deterrence is one of two primary justifications for permitting punitive damages for certain torts, but "[t]he prevailing rule" limits the availability of that remedy to cases "where a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable." *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2621 (2008) (internal quotation marks and citations omitted); see *Smith* v. *Wade*, 461 U.S. 30, 51 (1983) (requiring showing of "reckless or callous disregard for the plaintiff's rights" to authorize punitive damages under 42 U.S.C. 1983); Restatement (Second) of Torts § 908 cmt. b, at 464-465 (1979).

The same is true of substantive criminal law. Deterrence is one of "the two primary objectives of criminal punishment," *Kansas* v. *Hendricks*, 521 U.S. 346, 361-362 (1997),

and "our criminal law is to no small extent justified by the assumption of deterrence." *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957). Yet both the magnitude of a criminal sanction—and, indeed, the difference between criminal and purely civil liability—often depends on whether the defendant had a particularly culpable state of mind. The same basic point holds true when assessing the need for "the harsh deterrent of exclusion." *Scott*, 524 U.S. at 369.[7]

c. "[T]he value of [the] deterrence" provided by the exclusionary rule also "depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. Where there is no "forbidden act" in the first place, only a negligent and apparently isolated failure to update a local police department's records, the value of any deterrence provided by applying the exclusionary rule is likely to be extremely low. Even when they receive their paycheck from a police department, clerical employees whose job responsibilities include maintaining records are simply not "engaged in the often competitive enterprise of ferreting

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[7] In *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974), the Court observed that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at very least negligent, conduct which has deprived the defendant of some right." The Court did not state that deterrence works equally well with respect to those fundamentally different kinds of wrongdoing, and it did not say that the existence of any degree of negligence, no matter how minor or isolated, invariably justifies the "massive remedy" (*Hudson*, 547 U.S. at 599) of suppression. "Negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others." *Black's Law Dictionary* 1062 (8th ed. 2004) (citation omitted). In its customary and ordinary sense, the term "negligent" connotes more a habitual failure to exercise proper care than a single isolated mistake. *Webster's Third New International Dictionary* 1513 (1993) (defining "negligent" as "that is marked by or given to neglect: that is neglectful esp. habitually or culpably").

out crime" (*Leon*, 468 U.S. at 914 (citations omitted)) in the same way as officers in the field. Rather, they are likely to view their jobs in much the same way as their counterparts who maintain similar records for courts.

In addition, police departments, like other organizations, have built-in incentives to keep accurate records. That common-sense proposition is supported by Federal Rule of Evidence 803(6), which creates an exception to the general prohibition on hearsay for records created and "kept in the course of a regularly conducted business activity." That Rule defines "business" to include "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit," Rule 803(6), and its advisory committee note makes clear that it encompasses otherwise qualifying records created and kept by police departments, see Rule 803(6), advisory committee note, 1972 Proposed Rules. The very premise of Rule 803(6) is that such records have "unusual reliability," because of "systematic checking, * * * regularity and continuity which produce habits of precision, * * * actual experience of business in relying upon them, or * * * a duty to make an accurate record as part of a continuing job or occupation." *Ibid.*

Petitioner contends (Br. 37-38) that failure to require suppression here "would give law enforcement a perverse incentive" to structure their recordkeeping to indicate routinely that there is a basis for an arrest when there is not. Petitioner cites no evidence that the sort of thing he posits is actually occurring, and there is no suggestion that it happened here. Cf. *Missouri* v. *Seibert*, 542 U.S. 600, 605-606 (2004) (plurality opinion) (citing testimony by an interrogating officer "that he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught") (citation omitted); *id.* at 608 n.1,

609-611 (citing evidence of that technique's widespread use). To the contrary, the error in this case appears to have been entirely inadvertent, and it was detected and corrected within 15 minutes of Dale County warrant clerk Morgan's original report. Pet. App. 3a.

Petitioner acknowledges (Br. 36-37) that this Court's decisions already establish that officers in the field are not entitled to make an arrest based on information they know to be false or in reliance on a record-keeping system they have cause to know is inaccurate. See *Evans*, 514 U.S. at 15-16; *id.* at 17 (O'Connor, J., concurring); *Leon*, 468 U.S. at 923. Accordingly, petitioner must further posit (Br. 37-38)—again, without any evidence or even intuitive force—that police departments will conspire "to leave officers in the field ignorant of the deficiencies in police record management" and thus "manufacture * * * good faith." Petitioner provides no explanation for how this sort of far-fetched scheme would actually work, and it would seem bound to be short-lived because it is difficult to see how officers in a department that regularly arrested people without legitimate basis could maintain "plausible deniability about inaccuracies in police records." *Id.* at 38.[8]

Finally, petitioner's argument on this point rests on the implausible—and entirely unproven—assumption that police officers in the field invariably *benefit* from being told

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[8] Petitioner also posits (Br. 38) a scenario where one police officer "tell[s] colleagues that a warrant was in force, when in fact, it had not yet even been sought." This Court has made clear, however, that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether the costs of applying the exclusionary rule outweigh its benefits. *Leon*, 468 U.S. at 911. A case involving a law enforcement officer's deliberate deception of another officer differs entirely from a case involving an isolated and negligent error in recordkeeping, on which an officer reasonably relies.

that people for whom there is no valid arrest warrant are actually subject to arrest. It is of course true that, in this particular case, "[p]olice negligence * * * enabled the discovery of evidence that would otherwise have been outside the reach of the police." Pet. Br. 34; see *id.* at 48. But officers could not predict that having expired warrants in a recordkeeping system would usually produce that result. And "the appropriate perspective from which to consider the deterrent effects of excluding evidence based on police department negligence is *ex ante*, not *ex post*." *Id.* at 44.

In the typical situation, an arrest based on inaccurate information or a recalled warrant will result in nothing more than a fruitless waste of police resources, a matter of particular concern given the inability of most departments to devote adequate resources to pursuing *genuine* leads and ensuring execution of *valid* warrants. See Pet. Br. 42 (acknowledging that "many * * * searches" conducted as a result of inaccurate or outdated information "will produce no incriminating evidence"). In such cases, improper arrests may bring negative attention to the police, inspire the ire of citizens, and erode the trust and good will that a police department normally seeks to cultivate. In addition, a flawed recordkeeping system is likely to make mistakes that cut both ways, including expired warrants and omitting current ones. Erroneous information that no warrant exists when one is outstanding will not only forestall justified arrests, but also deprive officers of information that could enhance their ability to protect their own safety. Cf. *Hiibel* v. *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). The court of appeals was thus on solid ground when it stated that "[i]naccurate or outdated information in police files is just as likely, if not more likely, to hinder police investigations as it is to aid them." Pet. App. 10a.

d. Whether the exclusionary rule can be expected to provide appreciable marginal deterrence is also a function of other deterrents that are already in place. See *Scott*, 524 U.S. at 368 (framing inquiry as what "additional deterrence" would be provided by application of the exclusionary rule). It is true that this Court has concluded that criminal remedies are inadequate as the sole means of safeguarding Fourth Amendment requirements. See *Mapp* v. *Ohio*, 367 U.S. 643, 651-653 (1961). But the Court should not "assume that exclusion in this context is necessary deterrence simply because [it] found that it was necessary deterrence in different contexts and long ago." *Hudson*, 547 U.S. at 597. As explained, see pp. 23-25, *supra*, police departments have a strong incentive to maintain adequate records. In addition, substantial deterrents to sloppy recordkeeping already exist, even without "the harsh deterrent of exclusion." *Scott*, 524 U.S. at 369.

i. One deterrent is "the possibility of reprimand or other job discipline for carelessness in record keeping." Pet. App. 10a. Petitioner faults the court of appeals (Br. 45) for "fail[ing] to offer any factual support for its assertion that internal discipline might address the problem here." But as early as 1980, this Court "felt it proper to 'assume' that unlawful police behavior would 'be dealt with appropriately' by the authorities." *Hudson*, 547 U.S. at 598-599 (quoting *Payner*, 447 U.S. at 733-734 n.5). More recently, the Court recognized that "modern police forces are staffed with professionals" and stated that "it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect." *Id.* at 599; accord *Nix* v. *Williams*, 467 U.S. 431, 446 (1984) ("Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline * * *—also lessen the likelihood that the ultimate or inevitable discovery exception will pro-

mote police misconduct."). At any rate, virtually all employees are subject to reprimand and discipline for negligent performance of their jobs, and there is no reason to assume, particularly without any actual evidence, that police department employees are somehow uniquely immune from consequences for slipshod recordkeeping.

Petitioner invokes "common sense" in support of his assertion (Br. 45) that internal discipline is unlikely to follow "[i]f employees' negligence leads to the discovery of admissible evidence that otherwise would be unavailable." Like petitioner's earlier erroneous argument about the nature of a police department's incentives to keep accurate records, however, that contention overlooks that most instances of lax recordkeeping will *not* lead to the discovery of admissible evidence, and it is impossible for a given employee to know ahead of time whether a particular instance of laxity will do so.

Petitioner also contends (Br. 45) that the fact that "the employee who failed to make the proper change to Dale County's records has not been identified" means that employee discipline cannot be an effective deterrent against future mistakes. There are at least two problems with that argument. The first is that it overreads the existing record. The most recent evidentiary hearing in this case was held on October 21, 2005, the only witness from the Dale County Sheriff's Department was warrant clerk Morgan, and petitioner never asked Morgan if she knew what internal steps had been taken to identify or discipline the person who returned the physical warrant but failed to update the computer record. The Court cannot assume that the Dale County Sheriff's Department would be unable to discover which employee was responsible for the error, particularly if this single and apparently isolated one were to develop into a more substantial problem.

The second problem is that petitioner's argument proves far too much. If the potential difficulty of identifying the most directly responsible employee meant that internal discipline procedures could not be effective in deterring future errors, then suppression would be unlikely to be an effective deterrent for the same reason. And if petitioner were to respond that suppression could underscore the need for better training and monitoring throughout the Dale County Sheriff's Department, that position would assume that the department would be relatively indifferent to errors in its warrant system absent the deterrence force of exclusion. As discussed above, nothing supports that assumption, and much common sense contradicts it. Indeed, the diligence of warrant clerk Morgan in discovering the error and promptly remedying it suggests that interagency law enforcement cooperation is built on reasonable efforts at accuracy, not based on systematic carelessness.

ii. Petitioner's argument that police departments have an incentive to tolerate or even encourage bad recordkeeping is also belied by the fact that such conduct could potentially subject both the department and its employees to civil liability. Cf. *Hudson*, 547 U.S. at 597, 599; *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984) (stating that "the availability of alternative remedies" undermines "the deterrent value of the exclusionary rule"). Regardless of whether civil remedies were available or adequate in the past, this Court's more recent decisions establish that it is now appropriate to presume that "civil liability is an effective deterrent." *Hudson*, 547 U.S. at 598.

Petitioner and his amici contend that actions under 42 U.S.C. 1983 are unlikely to provide an effective deterrent with respect to the type of error at issue here, but their arguments largely depend on petitioner's earlier erroneous claim that suppression is essential because plaintiffs

could not identify the responsible employee (Pet. Br. 46) and on claims that this Court has already rejected in other contexts. Petitioner and his amici invoke the prospect that individual government officials would be entitled to qualified immunity. Pet. Br. 47; ACLU Amicus Br. 4-5, 8-9; NACDL Amicus Br. 14. This Court has already determined, however, that "the threat of litigation and liability will adequately deter [individual government officials from committing constitutional violations] no matter that they may enjoy qualified immunity." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001).

At any rate, the relevant inquiry for qualified-immunity purposes is whether a reasonable officer in the defendant's position "could have believed" that a given course of action was lawful. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Officers who deliberately "tell colleagues that a warrant [i]s in force, when in fact, it had not yet been sought," or direct that a database be "set up * * * to return indications that warrants exist" when they do not "in the hope that [it] would permit a broader range of searches" (Pet. Br. 38), are not likely to meet that standard. Experience also indicates "that the lower courts are allowing colorable * * * suits to go forward, unimpeded by assertions of qualified immunity," *Hudson*, 547 U.S. at 598, or the concerns about causation identified by petitioner (Pet. Br. 46) and his amici (ACLU Amicus Br. 9-10).[9]

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[9] See, *e.g.*, *Peña-Borrero* v. *Estremeda*, 365 F.3d 7, 13 (1st Cir. 2004) (reversing dismissal where officers arrested "[d]espite facially authentic documentary evidence that [a previously issued] warrant was no longer effective, and with knowledge that they had failed to follow precautionary procedure to assure its vitality"); *Clanton* v. *Cooper*, 129 F.3d 1147, 1156-1157 (10th Cir. 1997) (affirming denial of summary judgment to fire marshal agent who knowingly transmitted false statements via the National Crime Information Center); *Milligan* v. *United*

A person who is arrested based on an erroneous entry in a government recordkeeping system may also be able to recover from "the deep pocket of municipalities." See *Hudson*, 547 U.S. at 597; see *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). Unlike individual officers, local governments cannot assert qualified immunity, see *Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980), and they may be held liable if a constitutional violation is attributable to their own policies, customs, or usages, see *Monell*, 436 U.S. at 690-691, such as the sort of deliberate failure to maintain accurate records hypothesized by petitioner, or sufficiently serious failures to train or supervise, see *City of Canton* v. *Harris*, 489 U.S. 378, 387 (1989). Here too, there is evidence "that the lower courts are allow-

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States, No. 3:07:1053, 2008 WL 2280178, at *10 (M.D. Tenn. May 30, 2008) (denying summary judgment where "[a]n objective reading of the arrest file reveals that the officers' reliance on that file, and their failure to check on the warrants themselves, was unreasonable"); *Willis* v. *Mullins*, 517 F. Supp. 2d 1206, 1227 (E.D. Cal. 2007) (denying qualified immunity because whether reliance on a list stating that plaintiff was still on parole "was reasonable under the circumstances cannot be determined as a matter of law from the facts provided"); *McMurry* v. *Sheahan*, 927 F. Supp. 1082, 1088 (N.D. Ill. 1996) (denying motion to dismiss where plaintiff had sufficiently alleged that defendants were aware "of the many problems which plague[d]" the relevant data systems but "chose to ignore those problems"); *Gray* v. *Sheahan*, No. 96 C 220, 1996 WL 672255, at *3 (N.D. Ill. Nov. 17, 1996) (denying motion to dismiss where plaintiff had sufficiently alleged that defendant "knew that the computer system inaccurately reported the status of warrants," but "did nothing to correct the situation"); *Kirk* v. *Hesselroth*, 707 F. Supp. 1149, 1152, 1155 (N.D. Cal. 1988) (denying summary judgment to police inspector who caused plaintiff's subsequent arrest by entering inaccurate information into a computer database), aff'd, 914 F.2d 262 (9th Cir. 1990).

ing colorable * * * suits to go forward." *Hudson*, 547 U.S. at 598.[10]

The other arguments raised by petitioner's amici fare no better. They contend that potential plaintiffs "lack * * * resources to litigate civil rights claims" (NACLD Amicus Br. 15), and that "few attorneys will be willing to undertake [such a] case" (ACLU Amicus Br. 7). The number of reported decisions suggests otherwise. See notes 9-10, *supra*. At any rate, 42 U.S.C. 1988(b), which "authorize[s] attorney's fees for civil-rights plaintiffs," "answers this objection." *Hudson*, 547 U.S. at 597. Amici also contend that civil actions cannot provide adequate deterrence because of the limited size of the likely damages awards. ACLU Amicus Br. 14-15; NACDL Amicus Br. 15. But Section 1983 actions are designed to deter constitutional violations "through a mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses," *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986)— and a jury's failure to award sizeable monetary relief would reflect only the jury's appraisal of

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[10] See, *e.g.*, *Berg* v. *County of Allegheny*, 219 F.3d 261, 275-277 (3d Cir. 2000) (per curiam) (holding municipality not entitled to summary judgment where it employed a system for issuing warrants "where the slip of a finger could result in wrongful arrest and imprisonment"), cert. denied, 531 U.S. 1072, and 531 U.S. 1145 (2001); *McMurry*, 927 F. Supp. at 1091 (denying motion to dismiss where plaintiff had pled that a municipality's policymakers had "actual knowledge" for more than a decade "that the warrant computer systems at issue [were] not reliable" but "fail[ed] to train its officers to check for" errors before making arrests and took "no steps to remedy its procedures for investigating the validity of warrants shown by its computer to be outstanding"); *Rogan* v. *City of Los Angeles*, 668 F. Supp. 1384, 1387-1398 (C.D. Cal. 1987) (holding that city was responsible as a matter of law for plaintiffs repeated arrests pursuant to a computer record that failed to describe suspect with particularity).

quantifiable injuries. That those injuries may be limited in a particular case provides scant reason to award criminal defendants the windfall of suppression.

Finally, petitioner and his amici complain that various forms of civil liability may not be available in every State or in every circumstance. But Fourth Amendment protections and remedies do not "vary from place to place." *Virginia* v. *Moore*, 128 S. Ct. 1598, 1605 (2008) (citation omitted). It would likewise be inappropriate to mandate nationwide suppression because a particular State's generally applicable law makes a county sheriff a state officer who cannot be sued under Section 1983, Pet. Br. 46-47; ACLU Amicus Br. 5, 11,[11] or fails to provide state law grounds for recovery, ACLU Amicus Br. 5-6, 15-20. If the citizens of Alabama conclude that additional deterrence is necessary to deter mistaken arrests based on officers' good-faith reliance on negligently maintained records, they are, of course, free to amend their own State's law. See *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment) (stating that if existing measures for deterring Fourth Amendment violations "prove ineffective, they can be fortified with more detailed regulations or legislation."). Alabama's failure to do so, however, does not supply a basis for expanding the scope of the exclusionary rule throughout the Nation.[12]

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[11] This Court has noted that efforts by "state and local governments [to] manipulate the titles of local officials in a blatant effort to shield the local governments from liability [under Section 1983] * * * are already foreclosed by" *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988). See *McMillian* v. *Monroe County*, 520 U.S. 781, 796 (1997).

[12] For the same reason, petitioner errs in suggesting (Br. 39-40) that this Court should require suppression to avoid undermining efforts by state courts "to regulate [state] police departments" and ensure compliance with "the state constitution, evidence code, or judicial policy."

e. The lack of appreciable deterrent effects that would flow from requiring suppression in this case is further confirmed by the fact that the employee who made the negligent error in recordkeeping works for an entirely different police department than the officers who made the arrest. Cf. *Lopez-Mendoza*, 468 U.S. at 1043 (stating that "the exclusionary rule is likely to be most effective when applied to * * * 'intrasovereign' violations"). Petitioner does not contend that the Coffee County Sheriff's Department, whose officers made the arrest, has any control over recordkeeping in Dale County, or any mechanism for identifying, disciplining, or providing further training to the particular Dale County employee who made the error at issue here. Accordingly, "the deterrent effect of the exclusion of relevant evidence" from petitioner's trial would likely have been both indirect and "highly attenuated." *Janis*, 428 U.S. at 458.

3. The costs of exclusion cannot be justified

Although the "existence" of appreciable "deterrence benefits * * * is a necessary condition for exclusion," *Hudson*, 547 U.S. at 596, this Court has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence," *Scott*, 524 U.S. at 368; accord *Hudson*, 547 U.S. at 596-597 (deter-

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This Court rejected an analogous claim in *Moore*, concluding that mandating suppression as a matter of federal law in order to deter violations of state law would undermine a State's ability to tailor its remedies for violations of its own law. 128 S. Ct. at 1606. A State may elect to suppress evidence in its own courts in order to deter violations of state law, but that would provide no justification for varying federal law protections or requiring every other State to do the same. In any event, the state court decisions cited by petitioner (Br. 39-40) are based on those courts' erroneous reading of this Court's decisions in *Leon* and *Evans*.

rence is a necessary, not "sufficient condition"); *Leon*, 468 U.S. at 910; *Alderman*, 394 U.S. at 174. Instead, the Court must also determine whether any "incremental deterrent effect," *Calandra*, 414 U.S. at 351, of applying the exclusionary rule would be "outweighed by the acknowledged costs to other values vital to a rational system of justice," *Stone*, 428 U.S. at 494. The Court has declined to depart from this balancing approach even where the failure to apply the exclusionary rule will leave certain types of Fourth Amendment violations undeterred by any suppression remedy. See, *e.g.*, *Hudson*, 547 U.S. at 596 (knock-and-announce violations). Here, the result of the required balancing cuts decisively against suppression.

First, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether the costs of applying the exclusionary rule outweigh its benefits. *Leon*, 468 U.S. at 911; accord *Brown*, 422 U.S. at 604. The decisions that initially crafted the exclusionary rule and then applied it to the States involved intentional conduct that directly violated a suspect's Fourth Amendment rights, see *Weeks* v. *United States*, 232 U.S. 383, 386, 393-394 (1914); *Mapp*, 367 U.S. at 644-645, and the Court has stated that suppression is most justified "where a Fourth Amendment violation has been substantial and deliberate," *Franks*, 438 U.S. at 171. In this case, in contrast, any Fourth Amendment violation occurred notwithstanding the objective good faith of everyone involved, and only as a result of several separate acts and omissions that occurred over the course of months. To require suppression of the very instrumentalities of the offenses with which petitioner is charged would bestow upon petitioner an extraordinary windfall, "contrary to the idea of proportionality that is essential to the concept of justice." *Stone*, 428 U.S. at 490; see *United States* v. *Cazares-Olivas*, 515 F.3d

726, 728 (7th Cir. 2008) (Easterbrook, C.J.) ("permitting people to get away with crime is too high a price to pay for errors that * * * stem from negligence rather than disdain for constitutional requirements"), petition for cert. pending, No. 07-10647 (filed Apr. 28, 2008).

Second, this Court has recognized that some latitude must be allowed for honest mistakes. Courts cannot reasonably expect anyone—including the police—to make no errors whatsoever. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990); *Maryland* v. *Garrison*, 480 U.S. 79, 87 & n.11 (1987); *Hill* v. *California*, 401 U.S. 797, 803-804 (1971); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949); see *Groh* v. *Ramirez*, 540 U.S. 551, 568 (2004) (Kennedy, J., dissenting). The district court expressly held—and petitioner does not contest—that "there [was] no credible evidence of routine problems with disposing of recalled warrants and updating records in Dale County," Pet. App. 12a (internal quotation marks omitted); in fact, there is no evidence in the record that this particular kind of error had *ever* occurred before this case. The error that led to petitioner's arrest was detected within 15 minutes of the check of the in-office computer system that revealed an outstanding warrant for petitioner's arrest, and it came to light as quickly as it did because of warrant clerk Morgan's diligent efforts to locate the physical copy of the warrant. Morgan had no way of knowing that petitioner had already been arrested when she called the Coffee County Sheriff's Department to alert its officers of the error, and the most reasonable explanation of Morgan's actions is that she was attempting to update her earlier report *before* petitioner was apprehended. No sanction—no matter how severe—can deter every possible error, no matter how isolated or brief in duration, and requiring suppression in a case such as this one would be entirely unwarranted.

C. That The Person Who Made The Negligent Error In This Case Works For The Dale County Sheriff's Department Does Not By Itself Require Suppression

The "categorical exception to the exclusionary rule" that this Court announced in *Evans*, 514 U.S. at 16, does not apply here, because both the district court (Pet. App. 15a, 18a) and the court of appeals (*id.* at 9a n.1, 11a) proceeded on the assumption that petitioner's arrest resulted from an error by the Dale County Sheriff's Department rather than the Dale County Clerk's Office. See *Evans*, 514 U.S. at 16 n.5 ("declin[ing] to address" whether a similar analysis "would apply in order to determine whether the evidence should be suppressed if police personnel were responsible for the error"). Petitioner and his amici contend that that distinction alone mandates suppression. Pet. Br. 9-11, 18, 24-32; NACDL Amicus Br. 2, 7, 17-20. They are mistaken.

1. This Court has repeatedly stated that "the exclusionary rule [is] aimed at deterring police misconduct," and that other government officials, including magistrates, court employees, and legislators, "are not the focus of the rule." *Krull*, 480 U.S. at 350; see *Evans*, 514 U.S. at 14; *Leon*, 468 U.S. at 916. Those cases thus establish that the exclusionary rule's deterrent rationale does not apply outside of the police force; they do not hold that the deterrent rationale applies with equal force *whenever* a Fourth Amendment violation is caused by the actions of any person who works for a police department. And no decision of this Court holds that the deterrent rationale applies to clerical workers who engage in back-office police recordkeeping. Indeed, the Court has repeatedly declined to apply the exclusionary rule when a Fourth Amendment violation was attributable solely to the actions of even police officers in the field.

For example, the Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials," *Scott*, 524 U.S. at 363, and it has done so without regard to the identity of the government officials who were responsible for the underlying Fourth Amendment violation. The Court has determined, for example, that the exclusionary rule should not apply in grand jury proceedings, *Calandra*, 414 U.S. at 347-352; on federal habeas corpus in situations where a state prisoner has already been afforded a full and fair opportunity to litigate a Fourth Amendment claim, *Stone*, 428 U.S. at 494; in parole revocation proceedings, *Scott*, 524 U.S. at 364-369; in civil deportation proceedings, *Lopez-Mendoza*, 468 U.S. at 1050; and in federal civil tax proceedings where evidence was illegally seized by state officials, *Janis*, 428 U.S. at 459-460. In all but one of those cases, the underlying conduct that was alleged to violate the Fourth Amendment had been committed by law enforcement officers. *Scott*, 524 U.S. at 360; *Stone*, 428 U.S. at 469-470, 472; *Janis*, 428 U.S. at 434-437; *Calandra*, 414 U.S. at 340-341; see also *Lopez-Mendoza*, 468 U.S. at 1035 (immigration officials).

Even in criminal prosecutions, the Court has never accepted the notion that suppression is appropriate whenever the person most directly responsible for a Fourth Amendment violation was affiliated with the police. See *Scott*, 524 U.S. at 364 n.4 (stating that the Court has "significantly limited [the exclusionary rule's] application even in" the context of criminal trials). The Court has repeatedly reaffirmed that a criminal defendant who was not the victim of an unlawful search may not invoke the exclusionary rule to obtain suppression of evidence seized in violation of another person's Fourth Amendment rights. See, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978); *Alderman*, 394 U.S. at 171-176. The Court has likewise declined to order sup-

pression of evidence unlawfully seized by police officers in situations where the evidence independently was, or inevitably would have been, discovered anyway, *Murray* v. *United States*, 487 U.S. 533, 541 (1988); *Nix*, 467 U.S. at 444, and it has held that violations by police officers of the constitutional "knock-and-announce" rule do not require suppression of evidence found during the resulting search, *Hudson*, 547 U.S. at 590-599. Even when illegally seized evidence is excluded from the government's case in chief, the Court has held that the evidence may still be used to impeach a defendant's own testimony on direct examination, *Walder* v. *United States*, 347 U.S. 62, 65 (1954), or to impeach a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination, *United States* v. *Havens*, 446 U.S. 620, 627-628 (1980).

In short, the Court has declined to adopt any sort of "*per se*" or "'but for' rule" (*Brown*, 422 U.S. at 603 (citation omitted)) that evidence must invariably be suppressed whenever police personnel are at fault. Rather, in the context of police errors as elsewhere, "application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348.

2. Police officers are generally entitled to rely upon information they receive from fellow officers. See, *e.g.*, *Ventresca*, 380 U.S. at 111. In some situations, police may be charged with the knowledge of certain of their fellow officers. Petitioner errs in asserting (Br. 29), however, that "settled Fourth Amendment precedent" establishes any "general principle" that a police officer who makes an arrest or conducts a search "is charged with [the] collective knowledge" of every other law enforcement official.

a. Petitioner relies most heavily (Br. 26-28) on *Whiteley* v. *Warden*, 401 U.S. 560 (1971). This Court has expressly stated, however, that *Whiteley*'s "precedential value regarding application of the exclusionary rule is dubious." *Evans*, 514 U.S. at 13; see *Overton* v. *Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., respecting the denial of the petition for a writ of certiorari) (describing *Evans* as "casting doubt on *Whiteley*'s exclusionary rule discussion").

In any event, the situation presented here differs from *Whiteley* in at least two significant respects. First, *Whiteley* involved a decision by a county sheriff to seek an arrest warrant based on a complaint that manifestly failed to establish probable cause. 401 U.S. at 561-569; see *Leon*, 468 U.S. at 923 n.24 (describing the warrant application at issue in *Whiteley* as a "'bare bones' affidavit"). This case, in contrast, involves a negligent failure by an unknown clerical employee in the Dale County Sheriff's Department to update the department's records. See *id.* at 911 (stating that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether the costs of applying the exclusionary rule outweigh its benefits).

Second, the connection between the underlying culpable conduct and the ultimate arrest is far more attenuated here than in *Whiteley*. In *Whiteley*, the sheriff who had obtained the invalid warrant immediately broadcast a statewide bulletin that led directly to the defendant's arrest on the very same day that the invalid warrant had been issued. 401 U.S. at 562-563. Here, in contrast, a substantial delay separated the underlying negligent mistake and petitioner's arrest, see J.A. 60 (stating that the warrant for petitioner's arrest had been recalled on February 2, 2004), and no "instigating officer" "rel[ied] on fellow officers to make the arrest," *Whiteley*, 401 U.S. at 568; see *Illinois* v. *Andreas*,

463 U.S. 765, 771 n.5 (1983) (describing *Whiteley*'s holding as applicable to situations "where law enforcement authorities are cooperating in an investigation"). "*Whiteley* and its progeny do not support [the] broad[] proposition that all information received by a police department * * * must be imputed to every officer in the department," *United States* v. *Santa*, 180 F.3d 20, 28 (2d Cir.), cert. denied, 528 U.S. 943 (1999), much less to officers in a wholly different department who never spoke with, or received any communication from, the person with the relevant knowledge.[13]

b. Petitioner also partially quotes (Br. 28) this Court's statement in *United States* v. *Hensley*, 469 U.S. 221 (1985), that "*Whiteley* supports the proposition that, when evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its *admissibility* turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest." *Id.* at 231 (first emphasis added). As noted previously, however, this case does not involve a situation in which an officer who lacked information sufficient to establish probable cause sought to evade the Fourth Amendment's requirements by directing a fellow officer to make an arrest. In addition, "[b]ecause the *Hensley* Court determined that there had been no Fourth Amendment violation, the Court never considered

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[13] The courts of appeals have generally followed the same approach in determining whether information possessed by one officer may be considered in determining whether an arrest by another officer was supported by probable cause. Although the lower courts employ somewhat different verbal formulations, "even courts that impute knowledge among officers working closely together will not do so absent a close working nexus between the officers during the stop or arrest." *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996). Cf. *United States* v. *Colon*, 250 F.3d 130, 135-137 (2d Cir. 2001) (declining to impute knowledge of a civilian 911 operator employed by the police department to dispatching or arresting officers).

whether the seized evidence should have been excluded." *Evans*, 514 U.S. at 12 (citation omitted). Finally, to the extent that language in *Hensley* can be read to equate the admissibility of a given piece of evidence with the determination of whether that evidence was acquired in violation of the Fourth Amendment, the Court has "long since rejected that approach." *Hudson*, 547 U.S. at 591; see *Evans*, 514 U.S. at 13.

c. Petitioner's reliance (Br. 28-29) on *Elkins* v. *United States*, 364 U.S. 206 (1960), fares no better. *Elkins* was decided a year before *Mapp*, whose "[e]xpansive dicta" about the scope of the exclusionary rule have been rejected by later decisions. *Hudson*, 547 U.S. 591. Like *Mapp*, *Elkins* expressly equated the question of whether the Fourth Amendment has been violated with whether the exclusionary rule should be applied, 364 U.S. at 213-215, and it cited "the imperative of judicial integrity" as an independent reason for requiring suppression of evidence, *id.* at 222. Neither proposition has survived later review. See *Hudson*, 547 U.S. at 591; note 4, *supra*. And to the extent that *Elkins* suggested that suppression is warranted whenever it would "serve[] the central deterrent purposes of the exclusionary rule," Pet. Br. 29, later cases recognize that the existence of some possible deterrence benefits represents the beginning, not the end, of the analysis about whether suppression is warranted in a particular situation. *Hudson*, 547 U.S. at 596; *Leon*, 468 U.S. at 910; *Calandra*, 414 U.S. at 350.

d. Petitioner also contends that "this Court's approach to other areas of criminal procedure" (Br. 29)—specifically, the doctrines associated with *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Edwards* v. *Arizona*, 451 U.S. 477 (1981)—suggests that it is appropriate to charge an arresting officer with the knowledge of all other law enforcement personnel

for purposes of the Fourth Amendment exclusionary rule. See Pet. 28-29 (making the same claim with respect jurisprudence under *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). This Court's decisions, however, confirm that jurisprudence developed under different constitutional provisions is not interchangeable. See *Brown*, 422 U.S. at 601 ("The exclusionary rule * * * when utilized to effectuate the Fourth Amendment, serves interests and polices that are distinct from those it serves under the Fifth."); *Dickerson* v. *United States*, 530 U.S. 428, 441 (2000) ("unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment"); *Withrow* v. *Williams*, 507 U.S. 680, 686-695 (1993) (restrictions on exercise of federal habeas jurisdiction in Fourth Amendment cases do not apply to claims under *Miranda*); *Oregon* v. *Elstad*, 470 U.S. 298, 303-304 (1985) (refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases to the *Miranda* context, due to the "fundamental differences" between two doctrines).

Even if non-Fourth Amendment decisions were relevant here, the doctrines on which petitioner relies are not analogous to this situation. *Brady* and *Kyles* v. *Whitley*, 514 U.S. 419 (1995) (Pet. Br. 29), involved a prosecutor's obligation "to disclose evidence favorable to the defendant." *Kyles*, 514 U.S. at 432; see *id.* at 437. This case, in contrast, involves no "affirmative duty." *Id.* at 432; see *Santa*, 180 F.3d at 28 n.3. In addition, although a prosecutor has a duty under *Brady* "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles*, 514 U.S. at 437, that duty "does not extend to information possessed by government agents not working with the prosecution," *United States* v. *Hall*, 434 F.3d 42, 55 (1st Cir. 2006). Because the unknown clerical employee who failed to update the Dale

County Sheriff's Department computer system was not "working with" the Coffee County Sheriff's Department officers who made the arrest—much less the United States Attorney's Office that ultimately brought this prosecution—this Court's *Brady* jurisprudence provides no support to petitioner, even by analogy.

Finally, both of the examples cited by petitioner involve situations where the conduct in question—failure to disclosure exculpatory evidence to the defense, and introduction of statements obtained from a suspect who has expressed a desire to deal with the police only through counsel, respectively—violates the commands of the Constitution as construed by this Court. See *Kyles*, 514 U.S. at 434 (noting the prosecutor's "constitutional duty" to disclose material exculpatory evidence); *Janis*, 428 U.S. at 443 (noting "the Fifth Amendment's direct command against the admission of compelled testimony"). In contrast, "the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution," *Scott*, 524 U.S. at 362; and "[t]he exclusionary rule provides no remedy for completed wrongs," *Lopez-Mendoza*, 468 U.S. at 1046.

D. This Case Presents No Opportunity To Consider Large-Scale Information Systems Accessible By Multiple Law Enforcement Agencies

Petitioner and his amici contend that suppression is necessary here because of the increasing use of large-scale computerized databases that are accessible by multiple law enforcement agencies. Pet. Br. 35-37 & nn.12-13, 40-42 & n.15; EPIC Amicus Br. 8-36; NACDL Amicus Br. 21-24. In *Evans*, various members of this Court noted that development as well. 514 U.S. at 17-18 (O'Connor, J., concurring); *id.* at 18 (Souter, J., concurring); *id.* at 22 (Stevens, J., dis-

senting); *id.* at 23, 26-29 (Ginsburg, J., dissenting). The use of computer technology in law enforcement raises important issues. But those issues are not presented by the facts of this case. No record was developed or findings made about them below. And the presentations by petitioner and its amici are both incomplete and skewed. Accordingly, the Court should reject petitioner's invitation to fashion a broad rule of exclusion based on considerations that are inapplicable to the facts of this case. Br. in Opp. 24.

1. The record indicates that the Dale County Sheriff's Department created a database for in-office use in order to keep track of outstanding warrants in that county. Neither the Dale County Clerk's Office (which is in the same building as the Dale County Sheriff's Department, J.A. 59), nor Coffee County Sheriff's Department personnel are able to access the Dale County Sheriff's Department database. J.A. 34, 39-41, 45, 55. Accordingly, the use of computer technology in this case did not "generate[] * * * new possibilities of error" or "amplif[y] [the] effect" of the record-keeping error that resulted in petitioner's arrest. *Evans*, 514 U.S. at 26 (Ginsburg, J., dissenting). The events of this case presumably would have played out precisely the same if Dale County had used handwritten notecards in a file box to keep track of its own outstanding warrants. See J.A. 59-61 (error occurred because unidentified person who returned the warrant to the Clerk's Office failed to update the database to reflect that the warrant had been recalled).

Not only does this case itself not involve a "powerful, computer-based recordkeeping system[]," *Evans*, 514 U.S. at 17 (O'Connor, J., concurring), no record was made below about such systems. The testimony at the two suppression hearings focused exclusively on the circumstances of petitioner's arrest and the non-computer-based ways information is shared between the Dale County Clerk's Office, the

Dale County Sheriff's Department, and the Coffee County Sheriff's Department. Petitioner presented no testimony or other evidence about the FBI's National Crime Information Center (NCIC), state fusion centers (EPIC Amicus Br. 9-13), or any of the various other databases discussed by Amicus EPIC (at 16-28), nor did the district court make any findings on such issues. Because this Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it would be inappropriate to craft a rule based on factual contentions that are not at issue here and that have not been subject to adversarial testing in the courts below.

2. The soundness of not deciding this case by reference to factual contentions that were not tested below, and that have no bearing on the particular police conduct at issue, is confirmed by the incomplete and skewed presentation about various FBI databases presented by petitioner and amicus EPIC. We provide the following account based on information from the FBI in order to give the Court a more balanced picture.

a. The FBI's Criminal Justice Information Services (CJIS) Division manages two recordkeeping systems: the NCIC, and the Fingerprint Identification Records System (FIRS). The NCIC is supported by the NCIC System, and the FIRS is supported by Integrated Automated Fingerprint Identification System (IAFIS) and the Interstate Identification Index (III).

The NCIC is an automated database of criminal justice information that operates under a shared management concept between the FBI and state and federal criminal justice agencies. It is available to nearly every law enforcement agency in the Nation. The FBI maintains the host computer while providing a telecommunications network to other federal criminal justice agencies and state criminal

justice agencies in all 50 States, four territories, and the District of Columbia. Criminal justice agencies enter records into the NCIC, and those records are, in turn, accessible to law enforcement agencies nationwide. The NCIC consists of a number of separate files. Seven property files contain records for articles, boats, guns, license plates, securities, vehicles, and vehicle and boat parts. The NCIC also includes 11 "person files," including Foreign Fugitive, Missing Person, Violent Gang and Terrorist Organization, and Wanted Person files. NCIC person files are organized by name and other descriptive data.

IAFIS, III, and FIRS are fingerprint-based systems, though III is accessed using name-based queries. The overwhelming majority of information in those systems consists of criminal history information on arrests and convictions, but they also contain identification information on certain other persons, including members of the military and federal civilian employees.

b. Petitioner and his amici fail to distinguish between the NCIC's name-based Wanted Person File, the system in which outstanding warrants are tracked, and fingerprint-based criminal history record systems.[14] A number of the statements cited by petitioner and EPIC about problems in recordkeeping involve criminal history records, rather than

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[14] Amicus EPIC cites nothing in support of its flat assertion (at 14) that "State criminal history records * * * are fed into the NCIC." The FBI advises that, in at least one State, certain biographical data on a subject for whom a state criminal history record has previously been established may be used to populate certain biographical fields in a state-maintained wanted person file, which could, in turn, potentially be forwarded to the NCIC Wanted Person File. In all cases, however, only the criminal justice agency that actually obtained a warrant may enter information about that warrant into the NCIC's Wanted Person File.

the NCIC's Wanted Person File.[15] In addition, one of the studies cited by petitioner (Br. 36 n.13) involved state-managed rather than federally-managed criminal history systems. Bureau of Justice Statistics, U.S. Dep't of Justice, *Survey of State Criminal History Information Systems, 2003*, at 8 (Feb. 2006) <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03. pdf>.

c. With respect to the NCIC Wanted Person File, the three reports cited by petitioner and his amici are all at least two decades old,[16] and they predate a number of important reforms that are expressly designed to prevent the sort of mistaken arrest that occurred here. In 1975, the FBI established what is now known as the Criminal Justice

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[15] Bureau of Justice Statistics, U.S. Dep't of Justice, *National Criminal History Improvement Program* (last modified May 21, 2008) <http://www.ojp.usdoj.gov/bjs/nchip.htm> (EPIC Amicus Br. 15 & n.4); Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Criminal History Records for Background Checks: National Criminal History Improvement Program (NCHIP)* (May 2003) <http://www.ojp.gov/bjs/ pub/pdf/ichrbc.pdf> (EPIC Amicus Br. 15-16 & n.5); Peter M. Brien, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records*, 11, 13 (July 2005) <http://www.ojp.usdoj.gov/bjs/pub/ pdf/iaichr.pdf>(EPIC Amicus Br. 14-15); Bureau of Justice Statistics, U.S. Dep't of Justice, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update* 38 (Dec. 2001) <http://www.ojp.usdoj.gov/bjs/abstract/umchri01.htm> (EPIC Amicus Br. 14-15).

[16] Congress of the United States, Office of Technology Assessment, *Federal Government Information Technology: Electronic Record Systems and Individual Privacy* 133-134 (June 1986) (Pet. Br. 36 n.13); Kenneth C. Laudon, *Data Quality and Due Process in Large Interorganizational Record Systems*, Communications of the ACM, Vol. 29, No.1, at 4, 8 (Jan. 1986) (Pet. Br. 35 n.12); Secretary's Advisory Comm. on Automated Personal Data Systems, Dep't of Health, Educ. & Welfare, *Records, Computers and the Rights of Citizens* 17-19 (July 1973) (EPIC Amicus Br. 29-30).

Information Services Advisory Policy Board (Policy Board), which consists of representatives from state and local criminal justice agencies; judges, prosecutors, and corrections officials; a representative of federal agencies participating in the CJIS systems; and representatives of criminal justice professional associations. 28 C.F.R. 20.35(b); 40 Fed. Reg. 22,114-22,115 (1975). The purposes of the Policy Board is "to recommend to the FBI Director general policy with respect to the philosophy, concept, and operational principles of various criminal justice information systems managed by the FBI's CJIS Division." 28 C.F.R. 20.35(a). The Policy Board, in turn, employs numerous working groups and subcommittees made up of subject-matter experts that meet biannually and continuously forward recommendations to the Policy Board. In 1999, the FBI completed a major overhaul of the NCIC, which resulted in the issuance of a new operating manual, which is itself continuously being updated.

Under the current system, numerous checks are designed to prevent mistaken arrests. Only approved criminal justice agencies may enter information about outstanding criminal warrants into the NCIC's Wanted Person File, and there is no requirement that a participating criminal justice agency enter all of its outstanding warrants. In addition, NCIC policy requires a law enforcement agency that receives a record as a result of an NCIC inquiry to make contact with the entering agency to verify that the information is accurate and up-to-date before making an arrest.

When warrants are entered, several safeguards seek to ensure that information is accurately entered. The database itself is programed to recognize and reject certain kinds of common errors with regard to data entry (for example, an invalid vehicle identification number), and to prompt the entering official to correct those errors before

proceeding. NCIC policy also requires a "Second Party Check" where an individual other than the person who initially entered the information must double-check all information upon its entry into the database.

Once a record has been entered into the Wanted Person File, the FBI uses a rolling validation system to ensure its continuing accuracy. Every 30 days, the NCIC System generates lists of all active records that were entered within 60-90 days previously and sends those lists to the appropriate CJIS systems agency, which serves as the FBI's point of contact in each state and various federal agencies. The entering agency is then required to verify the record's accuracy, completeness, and continuing validity, the last step of which requires it to check with other entities, including courts and prosecutors. If a record is not properly validated, the relevant CJIS systems agency is required to cancel it. After this initial round of validation, NCIC policy requires entering agencies to re-validate each active record on a yearly basis.

FBI staff also conduct regular audits to ensure information accuracy. Every three years, the FBI conducts a comprehensive audit of every state CJIS systems agency. The auditors visit the CJIS systems agency itself, as well as a number of local agencies within the State. In 2007, for example, the FBI conducted 23 audits and visited 273 local agencies. During the audits, the audit team conducts an administrative interview and reviews a random sample of NCIC records to ensure that they are complete, accurate, and valid. As part of the data quality review, the audit team also contacts courts to ensure the validity of the information contained in the random sample.

Statistics maintained by the FBI demonstrate that these and other procedures lead to the regular purging of out-of-date information and have significantly reduced the number

of errors in the NCIC's Wanted Person File. Although the total number of records is continuously changing, the FBI advises that, as of July 1, 2008, the Wanted Person File contained 1,543,493 records. The FBI further advises that, in 2007 alone, 1,799,462 records were cleared or cancelled from the Wanted Person File. Finally, the FBI advises that records reviewed during the current audit cycle suggest that the Wanted Person File currently has an error rate of 2.86%, with errors being defined to include situations where the warrant was invalid, the record contained inaccurate data, or the case file supporting the warrant could not be located.

Thus, although the record here is not adequate to permit a comprehensive review of all federal and state record-keeping systems, the available information undermines rather than supports petitioner's contention about the incentives of law enforcement officials to ensure the accuracy of computerized arrest records and the need for the "severe sanction" of exclusion. *Evans*, 514 U.S. at 14. The available information, consistent with the record in this case, instead supports the conclusion that suppressing evidence because of a one-time clerical error in a generally reliable law enforcement system cannot be justified by any need for incremental deterrence. Therefore, as in *Evans*, no sufficient benefits of suppression outweigh the high cost of excluding probative evidence of criminal conduct.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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BENNIE DEAN HERRING,
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v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

For almost a century, this Court has adhered to a clear, bright-line exclusionary rule in federal criminal prosecutions: courts must suppress evidence offered in the prosecution's case in chief which has been obtained directly through law enforcement wrongdoing that violates a defendant's Fourth Amendment rights. And contrary to the Government's suggestion that the exclusionary rule works with respect only to deliberate or systematic police misconduct, the classic examples of its application involve errors by individual officers: for example, when courts suppress the fruits of unwarranted *Terry* stops or arrests for which probable cause was lacking. This Court has repeatedly recognized that the exclusionary rule will reduce the overall number of such mistakes and thus deter – that is, prevent – constitutional violations.

Applying this rule to petitioner's case is straightforward. Petitioner was arrested in violation of the Fourth Amendment; the police had neither a valid arrest warrant nor probable cause to believe he had committed a crime. Incident to that unconstitutional arrest, the police conducted the search that produced the evidence at issue in this case. The sole reason the police conducted the unconstitutional arrest and search was because the Dale County Sheriff's Department, despite having received clear notice to the contrary, inaccurately reported the existence of a warrant.

Until now, when this Court has declined to require suppression, it has done so by identifying "categorical exception[s] to the exclusionary rule."

Arizona v. Evans, 514 U.S. 1, 16 (1995). For example, the rule does not apply in civil proceedings, *United States v. Janis*, 428 U.S. 433 (1976), or to cases in which the judiciary (rather than the police) was at fault, *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Evans*, *supra*, or to violations of the knock-and-announce rule, *Hudson v. Michigan*, 547 U.S. 586 (2006).

The Government does not argue that any categorical principle would permit introduction of the evidence obtained in this case. Rather, it proposes to revolutionize the exclusionary rule by turning it into a case-by-case balancing test under which the application of the rule to unconstitutional searches caused by negligent police recordkeeping would vary from department to department and even from officer to officer. Worse yet, the Government fails to advance even a coherent balancing argument. Although the Government recognizes that "the appropriate perspective from which to consider the deterrent effects of excluding evidence based on police department negligence is *ex ante*, not *ex post*," U.S. Br. 25 (quoting Pet. Br. 44), it ignores that principle, spending much of its time arguing instead that the individual arresting officers in this case could not have been deterred from arresting and searching petitioner once the negligent recordkeeping occurred. That observation is true, but beside the point. Petitioner has never argued that suppression is required here to change the incentives of individual *arresting officers* who rely on flawed police records. Rather, he has consistently argued that suppression provides an important

incentive for police *departments* to maintain accurate records in the first place.

To the extent that the Government even addresses that critical question, its arguments reflect a profound misunderstanding of both the incentives facing police departments and the potential for deterring police negligence. By making clear that courts will refuse to admit evidence discovered as a direct result of unreasonable failures to maintain accurate records, the exclusionary rule will induce police departments to take an appropriate level of care to ensure accuracy. And the Government's suggestion that either civil liability or internal discipline can substitute for suppression fails to recognize that the category of cases in which such remedies are most likely to work are cases in which, under its own approach, suppression would be appropriate as well. By contrast, in cases of police negligence, limitations on the availability of relief under 42 U.S.C. § 1983 and other remedial regimes make suppression an essential element of any successful system of deterrence.

In light of the Government's failure to offer a clear, workable alternative, this Court should reaffirm its time-honored position that police cannot take advantage of their own failure to act reasonably and that evidence seized as a direct result of unconstitutional searches that are the product solely of improper law enforcement activity must be suppressed.

I. SUPPRESSING EVIDENCE OBTAINED AS A DIRECT RESULT OF NEGLIGENT POLICE RECORDKEEPING WILL DETER FOURTH AMENDMENT VIOLATIONS.

The Government does not argue for a categorical exemption from the exclusionary rule for Fourth Amendment violations caused by negligent failures in police recordkeeping. In fact, the Government concedes that suppression may be appropriate in some cases of recordkeeping error. *See, e.g.*, U.S. Br. 18 n.5 (suppression may be appropriate when there are "systemic problems in a recordkeeping system"); *id.* at 24 (suppression may be appropriate when "regula[r]" errors occur). But the Government argues that the exclusionary rule should not apply *in this particular case* because of the specific facts and circumstances involved.

The Government is wrong for two reasons. First, the exclusionary rule depends categorically on the type of error involved, and police negligence properly triggers suppression. Second, even if this Court were to transform the exclusionary rule into a case-by-case balancing doctrine, the balance here would require suppression.

A. Evidence That Law Enforcement Obtains In Violation Of The Fourth Amendment As A Result Of Its Own Recordkeeping Errors Is Categorically Subject To Suppression.

1. The Government suggests that courts hearing suppression motions should engage in a case-by-case inquiry into the subjective awareness of arresting

officers with respect to the lack of an active warrant and into whether objectively unreasonable record maintenance before them is part of a larger pattern within a particular department. That suggestion has no precedent in this Court's decisions, and the Government has provided no reason to embrace a new approach here.

The exclusionary rule demands categorical treatment of police negligence rather than a totality-of-the-circumstances "exclusionary standard" because the rule is designed to alter the incentives facing law enforcement agencies and not merely to influence the future behavior of individual officers who have already committed a particular violation. The exclusionary rule "safeguard[s] against future violations of Fourth Amendment rights through the rule's *general* deterrent effect." *Evans*, 514 U.S. at 10 (emphasis added). "By refusing to admit evidence gained as a result of [unconstitutional] conduct, the courts hope to instill," both in "particular investigating officers" *and* "in their future counterparts, a greater degree of care toward the rights of an accused." *Michigan v. Tucker*, 417 U.S. 433, 447 (1974); *see also Leon*, 468 U.S. at 918 (noting that the deterrent effect of the exclusionary rule can alter either "the behavior of individual law enforcement officers or the policies of their departments").

In light of these goals, application of the rule cannot turn on department-specific facts that have nothing to do with whether a constitutional violation occurred. But that is the import of the Government's suggestion – a suggestion that would impose huge

and unnecessary burdens on the judicial system. First, the Government would require courts to determine not just whether the arrest before them violated the Constitution and was attributable to police negligence – a straightforward inquiry as the proceedings in this case illustrate – but also then to calculate the overall error rate within a police department's records. That latter assessment would require extensive discovery and factfinding even when the negligence appears to be "isolated." U.S. Br. 9.[1] Mistakes in recordkeeping are by definition likely to be exposed only when they lead to an unlawful arrest and incriminating evidence. If, as was true in this case, inaccurate files go months without being noticed or acted upon, the number of constitutional violations caused by recordkeeping errors will necessarily understate a department's actual error rate.

Having determined the error rate – itself a complex undertaking – courts faced with suppression motions would then have to address the question whether this error rate is unreasonable. That

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[1] The Government acknowledges that repeated recordkeeping errors could warrant suppression, but then perversely suggests that because "building a record of systemic problems may be difficult in a single criminal case, . . . such issues would be better addressed through a civil action." U.S. Br. 18 n.5. It is unclear whether once a plaintiff has won a civil action against a particular department, the Government would concede that suppression should follow in all subsequent criminal prosecutions involving searches by that department's officers that are based on recordkeeping errors. The Government's failure to trace out the implications of its position illustrates why this Court has never required such a showing with respect to any class of unconstitutional searches.

inquiry cannot be conducted in a vacuum. It presumably would require examining the record-keeping practices and error rates of departments other than the one responsible for the challenged search.[2]

Having done all that, courts would then have to inquire into the subjective state of mind of individual officers to determine whether those officers were aware of, or should have been aware of, the error rate. But this Court has already squarely rejected the idea of a subjective good-faith exception to the exclusionary rule. *Leon*, 468 U.S. at 915 n.13. An individual officer's subjective beliefs provide no basis for avoiding exclusion when the officer's actions rest directly on unreasonable conduct of other members of the law enforcement team. *Id.* at 923 n.24.

Finally, the court would presumably have to decide whether awareness of the department-specific error rate should have deterred the officers from conducting this particular arrest and search.

This novel multi-factor inquiry bears virtually no resemblance to the one this Court has traditionally conducted, which asks simply whether suppression could meaningfully deter a particular form of police conduct that causes constitutional violations. The admissibility of evidence under the Government's approach would come to depend not on the nature of the constitutional violation – as has been the case up until now – but on a series of department-by-

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[2] The Government's brief is entirely silent with respect to the overall level of recordkeeping error courts ought to countenance.

department or even officer-by-officer determinations made by individual judges hearing suppression motions.[3] This would undercut the functioning of the exclusionary rule, which would no longer provide useful guidance to police departments as to the evidentiary consequences of particular practices.

In short, the Government has proposed an unprecedented and unworkable approach to deciding the admissibility of evidence obtained solely as a direct result of law enforcement personnel's own negligence. By contrast, petitioner offers a clear, easily administrable rule consistent with this Court's longstanding approach: evidence obtained as a result of an unlawful, warrantless arrest that would not have occurred but for culpable conduct within the law enforcement team should be suppressed to ensure that law enforcement will not benefit from its own unreasonable conduct.

2. Contrary to the Government's persistent theme, none of these methodological principles vary when law enforcement has negligently, as opposed to purposefully, violated the Fourth Amendment. As it does with respect to other forms of "police illegality," *Leon*, 468 U.S. at 921, applying the exclusionary rule to negligence in recordkeeping creates a powerful and appropriate incentive for law enforcement

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[3] In addition, if suppression is appropriate only when it is necessary to influence the future behavior of the specific police personnel responsible for the violation, as the Government suggests, then presumably a police department's decision to fire those individuals could preclude suppression even in cases of deliberate misconduct since there would be no future misconduct to deter. This cannot be the correct result.

agencies and personnel to avoid conduct that results in unconstitutional arrests and searches.

The reliability of a department's records will depend to a substantial degree on the resources a department devotes to recordkeeping. A department that implements detailed recordkeeping protocols and conducts frequent audits and cross-checks is more likely to have an up-to-date list of active warrants than one where a clerk jots down "handwritten [notes] on file cards kept in a steel box." U.S. Br. 10. The Government's own brief illustrates this point by discussing recent steps undertaken by the federal government with respect to the FBI's Wanted Persons File "that are expressly designed to prevent the sort of mistaken arrest that occurred here," U.S. Br. 47, and that apparently have cut the federal error rate in half over the past twenty years, *compare* Pet. Br. 36 n.13 *with* U.S. Br. 50.

But recordkeeping, like everything else a police department does, costs time and money. So sufficient incentives must exist for a department to devote resources to keeping its records up-to-date rather than spending that time and money on other functions.

Here, the exclusionary rule plays a critical role. If evidence can be used in criminal cases only if the police records on which arresting officers have relied are accurate, departments will invest more to ensure the accuracy of those records than they otherwise would. This is particularly true given the common dynamic in how warrants records are used by police on the street. Police departments are not engaged in a continuous effort to locate and arrest every person

whose name appears on a department's warrants list, particularly when the offense for which a warrant was issued is relatively minor. *See* Randall Guynes & Russell Wolff, Un-served Arrest Warrants: An Exploratory Study (2004), *available at* http://www.ilj.org/publications/finalwarrantsreport.pdf (last visited Aug. 20, 2008). Rather, officers check the warrants list when they encounter an individual for some other reason and then decide to conduct some kind of inquiry or investigation. In *Evans*, for example, a police officer stopped Evans for driving the wrong way down a one-way street and only then checked his patrol car computer. In this case, Investigator Anderson discovered that petitioner, with whom he had a contentious relationship, was in the police impoundment lot, J.A. 17, and only then asked the department warrants clerk to check whether there was an outstanding arrest warrant.[4]

Contrary to the Government's unsupported speculations, *see* U.S. Br. 9, 25, the inaccurate presence of an individual's name on a police department's warrants list imposes no real costs on the department. The indication is likely to lie dormant unless some further incident prompts an inquiry. Departments therefore face no strong internal incentive to update warrants lists frequently. By contrast, if departments understand that the evidence they obtain from arresting and searching individuals on the basis of a reported

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[4] In the preceding five months, the Dale County Department apparently made no effort to serve the warrant, despite the fact that petitioner could have been easy to locate. *See* Pet. Br. 4.

warrant cannot be used if the warrant no longer exists, this creates a powerful countervailing incentive to keep lists up to date in order to avoid wasting time and effort on unusable arrests and searches.

This general dynamic is illustrated by the facts of this case. The Dale County Sheriff's Department initially failed to accurately update its records to reflect that the warrant had been recalled. It then compounded this "at the very least negligent" recordkeeping "breakdown" Pet. App. 8a (quoting *Tucker*, 417 U.S. at 447); J.A. 60,[5] because for at least five months, it conducted no sort of recordkeeping audit or file maintenance that could have corrected its initial dereliction. Far from this "substantial delay" between the initial negligent act and petitioner's arrest somehow minimizing police culpability, *see* U.S. Br. 39, the delay shows that the department's culpability was hardly "brief in duration," *id.* at 35.

3. More fundamentally, the Government's argument ignores how the exclusionary rule actually works to deter negligent police illegality. The Government acknowledges that the prospect of future adverse consequences "will provide incentives for regulated actors" – such as police departments –

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[5] Although the Government seeks to paint the failure to maintain accurate records here as an "honest mistake[]," U.S. Br. 35, the finding that personnel within the Dale County Sheriff's Department were "at the very least negligent," Pet. App. 8a, distinguishes what occurred here from objectively reasonable conduct that nevertheless produces an inaccuracy. Thus, this case does not present the question whether nonnegligent inaccuracies in police records require suppression.

"to take the appropriate level of care." U.S. Br. 21 (quoting Pet. Br. 43). But it then veers immediately into discussing an only tangentially related point – namely, that law seeks to deter not only negligent, but also reckless or deliberate, conduct. That the sanctions for deliberate or reckless conduct are often more punitive than the sanctions imposed for simple negligence, *see* U.S. Br. 21-22, is irrelevant to the question whether the exclusionary rule should be applied in cases of police negligence. Exclusion of evidence is a narrowly tailored sanction precisely calibrated to police illegality: it simply returns the government to the position it would have occupied had no constitutional violation occurred. *See, e.g., Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 391 (1920) (Holmes, J.) (exclusionary rule removes the "advantages" that the Government gained "by doing the forbidden act"). It does not punish the government at all; it only removes an incentive for unconstitutional behavior.

Indeed, the Government fails to acknowledge that *most* applications of the exclusionary rule involve conduct that can best be characterized as negligent – that is, objectively unreasonable in light of the circumstances involved – rather than purposeful. Consider the classic situations in which the exclusionary rule applies: an officer conducts a *Terry* stop and discovers contraband but the court hearing the suppression motion later finds that the officer lacked reasonable suspicion, *see, e.g., Florida v. J.L.*, 529 U.S. 266 (2000), or an officer makes a warrantless arrest and finds incriminating evidence during a search incident to the arrest but the court hearing the subsequent suppression motion

concludes he lacked probable cause, *see, e.g., Sibron v. New York*, 392 U.S. 40, 62-63 (1968). Both situations will overwhelmingly involve actions undertaken by individual officers who acted in subjective good faith: they *thought* there was reasonable suspicion or probable cause although it turns out they were wrong. At most, the arresting officers have been negligent.[6] But this Court has never even hinted that the fruits of an unconstitutional *Terry* stop or an unconstitutional warrantless arrest can be admitted because this is the first time the officer (or the entire department) has ever been mistaken about the existence of reasonable suspicion or probable cause or because the officer's or department's judgments are usually "reliable." *See* U.S. Br. 20. Neither subjective good faith nor the absence of a proven pattern of negligence can justify admitting evidence discovered solely as a direct result of objectively unreasonable police conduct.

Moreover, the Government's discussion of deterrence in substantive criminal law, see U.S. Br. 21-22, actually ignores the most salient analogy: federal regulatory offenses for which no conscious awareness of wrongdoing is required. In upholding convictions under public welfare statutes that omitted any scienter requirement, this Court has noted that when an individual's "mere negligence"

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[6] The test for whether there is a Fourth Amendment violation in the first place already provides the appropriate degree of leeway by permitting even mistaken stops or arrests as long as the officer's suspicions were objectively "reasonable" or there was "probable" cause to believe the defendant had committed an offense.

may pose a threat to others, "punish[ing] the negligent person though he be ignorant" of his crime will "stimulate proper care." *United States v. Balint*, 258 U.S. 250, 252-53 (1922); see also *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (concluding that the Federal Food, Drug, and Cosmetic Act "serve[s] as effective means of regulat[ing]" potentially harmful substances even though it "dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing"). So, too, with respect to bureaucratic negligence that violates individuals' Fourth Amendment rights. Eliminating the benefits that might otherwise accrue from negligent behavior will prevent constitutional violations by inducing departments to change their policies or supervise their employees more closely.

In any event, the Government misunderstands what deterrence means. It suggests that there is no need to apply the exclusionary rule to discrete examples of negligence[7] because "[n]o sanction . . . can deter every possible error." U.S. Br. 35. This argument stands deterrence theory on its head. No

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[7] It is, in fact, impossible to know whether the recordkeeping error in this case "was an isolated mistake." U.S. Br. 19. To be sure, the warrants clerk asserted at a second evidentiary hearing that her records were "reliable," Pet. App. 15a, after initially testifying that "several times" there had been communications problems. *See id.* at 14a-15a. But there is no evidence that the Dale County Department has ever conducted any systematic study of its records that could support this claimed reliability. Given the error rates discovered in the variety of audits mentioned by petitioner, his *amici*, and the United States, it almost certainly is the case that the error with respect to the warrant naming petitioner is part of a larger number of errors in the Dale County Department's files.

deterrence regime will eliminate every instance of the conduct it is designed to deter. Such logic would completely gut the exclusionary rule, for the rule applies by definition only in those cases in which it failed to deter a constitutional violation. From the standpoint of deterrence, there is no more reason to carve out an exception to the exclusionary rule in cases involving individual episodes of negligent recordkeeping than there would be to allow introduction of evidence seized during an individual unconstitutional warrantless arrest if that was simply an "isolated" instance of an officer, or a department, failing to abide by the Fourth Amendment.

Finally, the Government is wrong when it claims that it is impossible, or at least "less necessary and less appropriate," U.S. Br. 21, to deter nonsystematic negligence by means of exclusion. As petitioner has already explained, a police department's record-keeping error rate will be a function of the particular system it has in place – technology, procedures, training, and quality control. Police departments that place a higher priority on avoiding recordkeeping errors are likely to experience fewer of them. To the extent that state and local police departments fail to adopt the best available recordkeeping technology and practices, the unconstitutional searches that occur are in fact avoidable. Like other avoidable derelictions, they are amenable to being deterred by a straightforward application of the exclusionary rule to the category of unconstitutional warrantless searches caused by faulty police recordkeeping practices.

B. Even If Application Of The Exclusionary Rule To Cases Involving Police Recordkeeping Errors Depended On Case-by-Case Analysis, Suppression Would Be Appropriate Here.

1. The Government's first argument for why suppression is unwarranted under the particular facts and circumstances of this case is that "[t]he arresting officers could not, and should not have, been deterred." U.S. Br. 16; *see id.* at 16-19. That argument is true only in a trivial and irrelevant sense.

To be sure, once the negligent police conduct had already taken place – within the recordkeeping unit of the Dale County Sheriff's Department – it was too late to deter Investigator Anderson. But the same is true when an officer in good faith arrests a defendant based on a warrant obtained earlier by a fellow officer who knew or had reason to know the warrant was defective (either because his application affidavit was inadequate or because he knowingly or recklessly provided false information). Although there too the arresting officer "could not" and in some sense "should not" have been deterred, U.S. Br. 16, this Court has nonetheless recognized that suppression is appropriately applied to deter the earlier, unreasonable actions of law enforcement personnel that led to the unconstitutional arrest. This Court's opinion in *Leon* reaffirmed that suppression remains the appropriate remedy when a culpable officer "rel[ies] on colleagues who are ignorant of the circumstances under which the

warrant was obtained to conduct the search." 468 U.S. at 923 n.24 (citing *Whiteley v. Warden*, 401 U.S. 560 (1971)). This would be true even though the actual arresting officers had no reason to know that the originating officer's information was inadequate or inaccurate.[8]

That rule goes hand-in-hand with the complementary Fourth Amendment rule that permits police officers to rely on information they receive from other members of a law enforcement team "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), *see* U.S. Br. 17-19. That reliance is constitutionally acceptable only because the appropriate incentives are in place to ensure that those team members behave appropriately. A critical aspect of that system is the presence of the exclusionary rule.

2. The Government next tries to take this case outside the "general rule in a criminal proceeding" that "evidence obtained as a result of an unlawful, warrantless arrest [is] suppressible if the link between the evidence and the unlawful conduct is not too attenuated," *INS v. Lopez-Mendoza*, 468 U.S.

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[8] As petitioner pointed out in his opening brief, had Investigator Anderson himself been informed that the warrant had been recalled, the fruits of any subsequent search would of course have been suppressed. Pet. Br. 24-25. That surely would remain true even if Investigator Anderson had forgotten about the recall notice, even though once he had forgotten the recall, it would have been impossible to deter him. The Government provides no reason to treat this case differently because a series of police personnel were involved in the events leading up to the unconstitutional search.

1032, 1040-41 (1984), by emphasizing that the negligence here was committed by police employees who were not themselves "officers in the field." U.S. Br. 23. The Government's arguments combine sheer speculation with a profound distortion of deterrence theory.

First, the Government asserts, with no support whatsoever, that clerical employees within police departments somehow distance themselves from their office's "competitive enterprise of ferreting out crime," *Leon*, 468 U.S. at 914, and thus have little incentive to disregard constitutional constraints. The Government provides no reason to hypothesize such a distinction. Common sense suggests the opposite: Long-term employees in police departments, like long-term support personnel in other endeavors, are likely to assimilate the organizational culture and display loyalty to organizational goals. That rationale underlay this Court's observation in *Evans* that judicial clerical personnel were unlikely to perceive themselves as having any "stake in the outcome of particular criminal prosecutions" because they were judicial officers rather than "adjuncts to the law enforcement team." 514 U.S. at 15. Individuals who serve as "adjuncts" to the law enforcement process, as police support personnel clearly do, may often perceive a stake in the outcome of their department's operations that can skew their incentives, absent the deterrence provided by the exclusionary rule. In this case, for example, the Dale County warrants clerk relied on her ready list of warrants, rather than checking the actual warrants file (which would have taken only a few minutes), presumably because she thought speed was of the

essence in responding to a warrants inquiry – exactly the response one would expect from someone who sees herself as a key adjunct to the competitive enterprise of ferreting out crime.

Moreover, the incentives for negligent clerical behavior do not depend only on whether support personnel adopt the perspective of officers in the field. Police warrants clerks may negligently fail to keep records updated not because they affirmatively desire to violate individuals' rights but because other tasks, professional or personal, seem more important than regularly auditing or cross-checking their records.

3. Finally, the Government's speculation that the exclusionary rule would provide no incentive for police departments to alter their practices is undercut by its own brief. In trying to downplay the risk to constitutional rights posed by faulty police records, the Government places great weight on recent reforms undertaken by the FBI with respect to its list of wanted persons. See U.S. Br. 45-50. It is almost certainly the case that the NCIC's procedures, which now involve "numerous checks," *id.* at 48, rolling validation and re-validation, and regular audits, *id.* at 49, are far more detailed than anything done by the Dale County Sheriff's Department, which failed to exercise reasonable caution in maintaining its records.

As the growing adoption of large-scale, widely accessible law enforcement databases exposes even more citizens to the threat of unlawful arrest due to derelictions of recordkeeping duties, it becomes increasingly important that police departments pay

close attention to the accuracy of their recordkeeping systems since the risk of unconstitutional arrests or searches now attaches to a far greater number of police-civilian contacts. This Court does not need an extensive factual record to recognize this common sense conclusion. The Government downplays the risks of large-scale computerized information systems because the Dale County Sheriff's Department had a relatively primitive system. *See* U.S. Br. 43-44. But that observation actually cuts in the opposite direction. Excusing recordkeeping errors based on the level of technology a department chooses, as the Government seems to propose, would paradoxically reward those departments who retain outdated systems. If anything, the fact that the Dale County Department maintains a primitive system shows that minimizing recordkeeping errors is not a high priority for it. Its current system contains no mechanism to ensure the records are accurate and up to date, and provides no reminders that there are outstanding warrants to be executed. There is thus little doubt that the Dale County Department needs stronger, rather than weaker, incentives to maintain accurate records. This Court's longstanding exclusionary rule jurisprudence, which uses the rule to "instill" in police "a greater degree of care toward the rights of an accused" by "refusing to admit evidence gained as a result of [unconstitutional conduct," *Michigan v. Tucker*, 417 U.S. at 447, requires exclusion here.

II. NO REALISTIC SUBSTITUTES FOR EXCLUSION EXIST TO DETER THE KIND OF CONSTITUTIONAL VIOLATION INVOLVED IN THIS CASE.

Having devoted much of its brief to arguing that the exclusionary rule cannot prevent or deter constitutional violations like the one that occurred here, the Government shifts gears to argue that civil liability or internal departmental discipline somehow can. Its argument, however, gets the analysis precisely backwards. Far from being the right kind of case to exempt from "the continued operation of the exclusionary rule, as settled and defined by [this Court's] precedents," *Hudson*, 547 U.S. at 603 (Kennedy, J.), cases like petitioner's are distinctively ill-suited to deterrence through civil liability or internal discipline.

1. The Government's suggestion that civil liability under 42 U.S.C. § 1983, standing alone (that is, absent the possibility of suppression),[9] can provide

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[9] The Government recognizes that state law often provides no civil liability for unconstitutional police conduct. U.S. Br. 32. It goes on to suggest that suppressing evidence might therefore somehow "undermine a State's ability to tailor its remedies for violations of its own law." *Id.* at 33 n.12. But that argument fundamentally misunderstands the point. Unlike *Virginia v. Moore*, 128 S. Ct. 1598 (2008), the case on which the Government relies, this case involves a conceded *Fourth Amendment* violation and not merely a violation of state law. When a state court excludes unconstitutionally obtained evidence – and petitioner has already explained that the majority of state courts to have addressed the issue would have excluded the evidence introduced here, *see* Pet. Br. 39-40 – it vindicates the federal constitutional principle.

an adequate deterrent misunderstands the nature of the constitutional violation and mischaracterizes the law.

The possibility of suing the individual arresting officers in a case such as this is a red herring. The arresting officers, at least in cases where they neither knew nor had reason to know that the department's records were inaccurate, will be entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194 (2001); Pet. Br. 47; Brief of Amicus Curiae American Civil Liberties Union at 8-9. Thus, the Government's citation of cases in which courts permitted lawsuits to go forward against officers who acted in the face of "documentary evidence that the warrant was no longer effective," or who "ignored" problems that "plague[d]" a database, U.S. Br. 29 n. 9 (citing *Peña-Borrero v. Estremeda*, 365 F.3d 7, 13 (1st Cir. 2004); *McMurry v. Sheahan*, 927 F. Supp. 1082, 1088 (N.D. Ill. 1996)), is beside the point. To be sure, individual liability is appropriate in such cases: those officers not only violated the Fourth Amendment but they did so with a constitutionally culpable mindset, and qualified immunity does not protect "those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). But it is equally clear that in cases of knowing or reckless conduct by individual arresting officers, as the Government itself concedes, suppression is required as well. Civil liability is a supplement to, not a substitute for, suppression.

Substituting individual damages actions for suppression in cases of recordkeeping negligence would not only contravene this Court's precedent, but it would generate perverse incentives. If

arresting officers faced personal liability any time they relied, however much in subjective good faith, on inaccurate information, this would dissuade officers from executing any warrant without conducting an independent investigation into its continued existence. This would be inefficient and would overdeter police activity in the vast majority of cases in which the information was in fact accurate. Suppression is a more finely calibrated remedy.

If there are appropriate individual defendants in negligent recordkeeping cases, they would thus have to be the negligent back-office police personnel who failed to exercise appropriate care to maintain accurate records. But the difficulties with finding and suing such defendants make individual damages actions an implausible mechanism for deterring culpable negligence. First, as petitioner and his amici have already explained, it may be impossible even to identify the responsible defendant. See Pet. Br. 46. The Government does not so much as hint at how a potential section 1983 plaintiff could go about determining whom to sue. These difficulties would be exacerbated absent the exclusionary rule, since suppression hearings would then provide no opportunity to probe internal department practices once the arresting officers' bona fides were established.

Moreover, given the quite plausible possibility that one individual failed to make the appropriate initial notation but that a number of other individuals, over the ensuing months, failed to catch the error by failing to conduct audits or cross-checks, which, if any, of these employees is an appropriate defendant? This raises an additional problem: as a

doctrinal matter, can an individual who acted negligently in failing to accurately update a record be held liable at all for an arrest that is the product of a series of intervening actions by other government officials? That is, but for the independent actions of Investigator Anderson and Deputy Bradley, the actions of the unidentified, and perhaps unidentifiable, employee or employees in the Dale County Sheriff's Department would never have led to a violation of petitioner's constitutional rights.

In response to these practical problems, the Government makes the bizarre suggestion that this Court has "determined, however, that 'the *threat* of litigation and liability will adequately deter [individual government officials from committing constitutional violations] no matter that they may enjoy qualified immunity.'" U.S. Br. 29 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)) (interpolation in the original; emphasis added). Contrary to the Government's citation, *Malesko* never made any such suggestion. The Government's argument wrenches the quotation completely out of context. In fact, *Malesko* was not a case about individual officer liability at all; rather, it presented the entirely different question whether this Court should create a distinct cause of action against private corporations acting under color of federal law to supplement the individual damages remedy provided under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). It was in that very different context that the Court explained that individual damages actions provide sufficient deterrence even though there will be some cases in which individual defendants "may enjoy qualified

immunity." The Court was not making the nonsensical claim that the threat of litigation will deter a class of constitutional violations as to which immunity is invariably available, as would be the case with respect to suits seeking individual liability against police personnel who were not themselves negligent.

Indeed, beyond citing *Malesko* completely out of context, the Government offers no explanation whatsoever of why the prospect of fruitless litigation would have any deterrent effect, and common sense suggests exactly the opposite.[10] Indeed, there cannot be any realistic threat of litigation in the first place given the absolutely foreseeable lack of success on the merits and thus any prospect of attorneys' fees.

2. Nor would lawsuits against the police department whose inaccurate records led to an unconstitutional arrest, *see* U.S. Br. 30, provide appropriate deterrence. In light of this Court's decisions in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), and its progeny, the availability of governmental liability, far from undercutting the justification for the exclusionary rule, actually reinforces it.

Liability under *Monell* attaches only when the constitutional violation occurred pursuant to an official "policy." But these are precisely the kinds of

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[10] For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), this Court held, as a categorical matter, that *Bivens* suits cannot be brought by "federal employees whose First Amendment rights are violated by their superiors." *Id.* at 368. It would be absurd to suggest that the "threat of litigation" would nonetheless somehow deter such violations.

cases in which suppression, as well as damages, will be available even under the Government's approach.

The standard *Monell* case involves a jurisdiction that formally authorizes or tacitly condones constitutional violations. In *Monell* itself, for example, New York City maintained an express policy requiring pregnant employees to take unpaid leaves that created an unconstitutional irrebuttable presumption. In *Webster v. City of Houston*, 739 F.2d 993 (5th Cir. 1984) (en banc), for example, the policy consisted of the Houston Police Department's custom of planting "throw down" guns at the sites of police shootings to make it appear that individuals shot by officers had been armed.

With respect to these sorts of cases, in which a constitutional violation is the product of an official decision to violate or condone the violation of constitutional rights, municipal liability is clearly appropriate. But the Government concedes, as it must, that these are also the paradigmatic cases in which suppression is required as well. *See* U.S. Br. 18 n.5. Indeed, it seems hard to imagine a more appropriate case for suppression than one in which a police department's official policy is to violate the Fourth Amendment. Surely, if a police department had an affirmative practice of keeping warrants in its database even after those warrants have been recalled, suppression would be demanded. Thus, as a matter of logic, the availability of damages does nothing to undercut the rationale for the continued application of the exclusionary rule.

Perhaps recognizing that treating petitioner's case as providing for that sort of *Monell* liability

would damn its efforts to avoid suppression as well, the Government turns to a different category of municipal liability: the so-called failure to train claims that were recognized by this Court in *City of Canton v. Harris*, 489 U.S. 378 (1989). U.S. Br. 30. In *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997), this Court explained that under "limited circumstances," *Monell* liability might attach to "a deficient training 'program'" that "failed to prevent [constitutionally] tortuous conduct by employees." *Id.* at 407 (citing and quoting from *City of Canton*). The Government never explains, however, how this case can be forced into the failure-to-train pigeonhole. The culpable official omission here was not a failure to train, but a failure to take due care to ensure the accuracy of the ready-reference warrants list. Again, the Government's argument is circular. If *Monell* liability were available for such a claim, then suppression would clearly be required as well, since establishing the requisite proof of entity level "fault and causation," *Brown*, 520 U.S. at 405, shows that the department has struck the wrong balance with respect to protecting constitutional rights. But because the Government steadfastly denies that cases like petitioner's involve entity-level decisions, *Monell* liability cannot substitute for suppression. Here, too, exclusion and *Monell* liability rise and fall together.[11]

3. Nor will internal department disciplinary processes, standing alone, provide an adequate

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[11] Thus, the Government's citation of cases where there were documented repeat errors, *see* U.S. Br. 31 n. 10, provides no support for its argument

deterrent in the absence of the exclusionary rule. The Government's argument here suffers from the same fundamental problem as its other arguments about alternatives: it never identifies any characteristic of negligent recordkeeping cases that separates them from all the other forms of constitutionally culpable conduct to which suppression concededly applies. Put simply, if internal disciplinary processes cannot substitute for exclusion in cases of deliberate wrongdoing by arresting officers – and they cannot – what reason is there to suppose that internal discipline is somehow an adequate substitute in cases of negligent performance by back office personnel?

Indeed, in the absence of the exclusionary rule, derelictions of recordkeeping duties are distinctively unlikely to prompt the kind of internal discipline necessary to prevent further constitutional violations. The kind of employee misconduct most likely to trigger internal discipline is misconduct that imposes some substantial costs on a police department. Those costs might involve direct expenditures – for example, damages awards in section 1983 cases. But petitioner has already explained that neither individual nor *Monell* liability is likely in cases such as this.

Or the costs might be operational – undermining a department's efficiency. This case shows why those costs are tightly tied to the presence of the exclusionary rule. Keeping a bloated, outdated warrants list by itself imposes no costs on a department. As this case shows, officers are under no obligation to execute every outdated invalid warrant still sitting around in a department's

database. If anything, bloated lists offer departments an illegitimate benefit: increasing the possibility that officers will have a justification for stopping and searching individuals as to whom they have hunches that rise neither to the level of probable cause nor even to the level of reasonable suspicion necessary for a *Terry* stop.

It is the exclusionary rule that communicates, in a form that police departments will understand and to which they will respond, that there is no benefit to maintaining inaccurate records: nothing the police obtain by relying on those records will be admissible. Any time police officers expend on cases resting on inaccurate information will be wasted. But if the exclusionary rule is relaxed, that message is lost. Since internal discipline itself involves costs, the Government provides no reason to suppose that once suppression no longer follows from recordkeeping negligence that leads to unconstitutional arrests and searches, police departments will spend their resources on seeking to identify and discipline employees who fail to maintain up-to-date lists.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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OTHER AUTHORITIES

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Avery, Rudovsky & Blum, *Police Misconduct: Law and Litigation* (3d ed. 2007)... 12, 13

Casper, Benedict, and Perry, *Juror Decision Making, Attitudes and the Hindsight Bias*, 13 Law & Hum. Behav. 291 (1989)..... 14, 15

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Emery & Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urb. L.J. 587 (2000) 13

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IN THE

Supreme Court of the United States

No. 07-513

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ALABAMA IN SUPPORT OF PETITIONER

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with

[1] A letter of consent from Respondent to the filing of this brief has been lodged with the Clerk of the Court pursuant to Rule 37.3. Petitioner has filed a blanket letter of consent. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Alabama is one of its statewide affiliates. The ACLU has appeared before this Court in numerous cases involving the application and scope of the exclusionary rule, both as direct counsel and as *amicus curiae*. In addition, the ACLU has frequently litigated cases of police misconduct under 42 U.S.C. § 1983, both in this Court and the lower courts. We submit this brief to discuss the relationship between the exclusionary rule and civil remedies for police misconduct and, more particularly, why the possibility of a civil damage award in police misconduct cases, under either federal or state law, is not an effective substitute for the deterrent effect of the exclusionary rule.

FACTS

Bennie Herring appeals the Eleventh Circuit's decision affirming his convictions for possession of methamphetamine, 21 U.S.C. § 844(a), and for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). Herring asserted below that the district court erred when it denied his motion to suppress the drugs and gun recovered as a result of a search of Herring's vehicle.

The search of Herring's vehicle followed his visit to the Coffee County Sheriff's Department, where he had gone to retrieve personal items left in an impounded vehicle. While Herring was there, Investigator Mark Anderson—who knew Herring as a result of previous run-ins between the two—had the person in the Sheriff's Department in charge of monitoring warrants check for outstanding warrants for Herring. She found none, so Anderson then asked

her to check with her counterpart in the Sheriff's Department in neighboring Dale County. That employee reported, based on a computer search, that there was an outstanding warrant for Herring for failure to appear on a felony charge.

By the time the information was relayed, Herring had already left the Coffee County Sheriff's Department. Upon hearing that there was an outstanding warrant for Herring, Anderson and Deputy Sheriff Neil Bradley pursued, pulled over, and arrested Herring; they then searched Herring and his vehicle. Following the stop but before his arrest, Herring denied that he had an outstanding warrant.

Meanwhile, the employee in the Dale County Sheriff's Department learned that the warrant she had reported to Coffee County had been recalled five months earlier. She passed this information along, but by the time the correction reached Anderson, the drugs and gun already had been recovered.

After his indictment in the United States District Court for the Middle District of Alabama, Herring moved to have the drugs and guns suppressed as the product of an unlawful arrest in violation of the Fourth Amendment. The district court rejected Herring's motions, and Herring was subsequently convicted on both counts. Herring appealed to the Eleventh Circuit, which affirmed his conviction. *United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an illegal arrest and an invalid search. Under those circumstances, *amici* agree with Petitioner that this Court should adhere to and apply

here the century-old principle that evidence obtained in violation of the Fourth Amendment is inadmissible when that evidence was obtained as the result of the misconduct of law enforcement officials, whether intentional or negligent.

Amici also agree with the position advanced in other briefs, and therefore not repeated here, that the nationwide reliance by law enforcement on ever-expanding, inter-related and error-prone databases makes it more critical, not less, to apply the exclusionary rule as a means to encourage accurate recordkeeping by government officials.

This brief focuses on a different point. In affirming the denial of Petitioner's suppression motion, the Eleventh Circuit rested its opinion, in part, on the assertion that civil remedies could provide an effective deterrent to the constitutional violations revealed by this record without the necessity of applying the exclusionary rule. *Id.* at 1218.

Deterrence has never been the sole justification for the exclusionary rule. From the beginning, this Court has recognized that the exclusionary rule serves important constitutional principles wholly apart from its deterrent effect. On these facts, however, deterrence is a sufficient rationale to enforce the exclusionary rule simply because there is so little prospect that Petitioner will or could ever recover damages for the undisputed violation of his Fourth Amendment rights.

The obstacles to recovery under 42 U.S.C. § 1983 are substantial and, in all probability, insurmountable on this record. The arresting officers, acting on a facially valid warrant, are likely to be shielded from personal liability based on their mistaken but appar-

ently good-faith belief that Petitioner's arrest and incident search were done pursuant to a valid judicial warrant. In addition, there can be no recovery under Section 1983 for the negligent act of the law enforcement officer who made the initial error in failing to delete the revoked warrant from the computer database, even assuming that person is someday identified. *Respondeat superior* does not apply under Section 1983, so the Sheriff's Departments in Coffee and Dale Counties cannot be held accountable for the acts of their employees, nor can their senior law enforcement officials be held liable for the acts of their subordinates. In other jurisdictions, the counties might be held liable if it could be shown that their policies or practices caused Petitioner's constitutional violation, but even that possibility is foreclosed in Alabama by this Court's holding that Alabama sheriffs are officers of the state when performing their law enforcement duties and therefore shielded by the state's Eleventh Amendment immunity against damages. Finally, injunctive relief is almost certainly unavailable given the need for Petitioner to show that he will again be subject to the same constitutional violation in order to establish Article III standing.

More generally, there is little evidence to show that Section 1983 actions are an effective deterrent against police misconduct, even when they are successful. The available evidence demonstrates to the contrary, in part because of indemnification rules and in part because of political imperatives that typically compel continued funding of even recalcitrant police departments.

The prospects for civil relief are no better under Alabama state law than under Section 1983 and the deterrent effect of state tort litigation is, therefore,

equally slight. Individual law enforcement officers are protected by a sweeping immunity provided by state constitutional and statutory provisions. Alabama sheriffs cannot be held liable for their subordinates' actions based on existing precedent. Sheriff's Departments cannot be sued because they are not recognized by Alabama law as legal entities subject to suit. Finally, Dale and Coffee Counties are shielded from liability because they are not deemed responsible under Alabama law for the law enforcement activities of their Sheriff's Departments.

Given the impediments to recovery that Petitioner would face in any civil action arising from these facts, the exclusionary rule offers the only real prospect for deterring the police misconduct that so plainly violated Petitioner's Fourth Amendment rights in this case.

ARGUMENT

I. BECAUSE OF THE BARRIERS TO CIVIL RECOVERY UNDER BOTH FEDERAL AND STATE LAW, ONLY THE EXCLUSIONARY RULE CAN PROVIDE A MEANINGFUL DETERRENT TO THE CLEAR FOURTH AMENDMENT VIOLATION IN THIS CASE.

Since this Court first announced the exclusionary rule almost one hundred years ago in *Weeks v. United States*, 232 U.S. 383 (1914), it has been a bedrock principle of Fourth Amendment law that the government may not rely on evidence seized following a warrantless arrest that is unsupported by probable cause. In departing from that principle, the Eleventh Circuit primarily relied on this Court's decision in *United States v. Leon*, 486 U.S. 897 (1984). Petitioner persuasively

demonstrates why that reliance is misplaced, beginning with the fact that the search in *Leon* was based on a judicial warrant, albeit one that was later declared invalid. Here, of course, there was no warrant at the time Petitioner was arrested and searched.

Beyond this constitutionally critical distinction, the cost-benefit analysis that the Eleventh Circuit derived from *Leon* simply does not support the conclusion that the Eleventh Circuit reached. In fact, current law makes it exceedingly unlikely that Petitioner could ever obtain damages or injunctive relief under either federal or state law, despite the clear violation of his Fourth Amendment rights. The Eleventh Circuit's claim that the exclusionary rule is an unnecessary deterrent on the facts of this case because deterrence can be achieved just as effectively through other means is a classic example of a false premise leading to a faulty conclusion.

A. 42 U.S.C. § 1983

The barriers to recovery under Section 1983 are significant for any civil rights plaintiff. On the facts of this case, the chances of a successful recovery under Section 1983 are virtually non-existent. Given the procedural and substantive obstacles described more fully below, Petitioner lacks a realistic chance of recovery. Few individuals in Petitioner's position will even bother to sue and few attorneys will be willing to undertake his case. As a result, law enforcement agencies or officials will not be deterred by either the threat or the reality of a Section 1983 suit that has little chance of success.

1. Section 1983 Is Unlikely To Provide A Remedy On The Facts Of This Case.

The Petitioner in this case was unconstitutionally arrested and subsequently convicted in federal court based on evidence seized as a result of that unconstitutional arrest. There is no doubt that Petitioner's arrest violated the Fourth Amendment. It was not supported by probable cause or a judicial warrant. The law on that point was, and is, clearly established. *E.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975). Petitioner's constitutional injury is thus undeniable. Unfortunately, Petitioner's chances of recovering under Section 1983 for that constitutional violation are slim, at best.

The arresting officers are almost certainly shielded by qualified immunity under existing law, which protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). At the time of Petitioner's arrest, the arresting officers had been told that there was a valid arrest warrant. That information turned out to be false. But absent some reason that the officers should have doubted the reliability of that information that is not apparent on the present record, the chances are overwhelming that the officers will be granted immunity on the ground that reasonable officers in their position would not have known that there was no constitutional basis for Petitioner's arrest. *See Anderson v. Creighton*, 483 U.S. 635, 646 (1987) ("The general rule of qualified immunity is intended to provide government officials with the ability 'rea-

sonably [to] anticipate when their conduct may give rise to liability for damages'") (citation omitted); *Saucier v. Katz*, 533 U.S. 194 (2001) (qualified immunity applies where a reasonable officer would have thought that the alleged act was lawful in light of clearly established law and the factual information possessed at the time). As the Third Circuit said in *Berg v. County of Allegheny*, 219 F.3d 261, 273 (3d Cir. 2000) (collecting cases), "we have generally extended immunity to an officer who makes an arrest based on an objectively reasonable belief that there is a valid warrant." Other circuits have ruled similarly.[2]

The chances of recovery are remote, as well, against the employee who failed to delete the record of Petitioner's revoked arrest warrant from the Dale County database or the employee who passed along the inaccurate information in the database to law enforcement officials in Coffee County, where Petitioner was arrested. The second employee will surely assert an immunity claim based on her "objectively reasonable belief that there [was] a valid warrant." The first employee has never been identified and, even if identified, would surely argue that the mere failure to update the computer database did not intentionally lead to Petitioner's arrest and thus did not violate the Fourth Amendment. *See Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) ("a Fourth Amendment [violation occurs] . . . only where there is governmental termination of freedom of movement *through means intentionally* applied").

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[2] *See Pickens v. Hollowell*, 59 F.3d 1203, 1207-08 (11th Cir. 1995); *Salmon v. Schwarz*, 948 F.2d 1131, 1140-41 (10th Cir. 1991); *Bennett v. City of Grand Prairie*, 883 F.2d 400, 408 (5th Cir. 1989); *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987).

In other circumstances, the Due Process Clause might fill in the constitutional gaps and provide a cause of action for Petitioner's deprivation of liberty. However, in *Daniels v. Williams*, 474 U.S. 327 (1986), this Court held that mere negligence does not establish a due process violation. Petitioner could, in theory, prevail on a due process claim by proving that either the failure to update the Dale County database in a timely fashion or the failure to check the files for the actual warrant before falsely informing Coffee County that there was an outstanding warrant for Petitioner's arrest demonstrated "deliberate indifference" to Petitioner's constitutional rights. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853-54 (1998). On the present record, suffice it to say, it appears that would be a very difficult claim to prove.

Petitioner would face equivalent, if not greater, difficulties in seeking to recover against other possible defendants in a civil action. Because *respondeat superior* does not apply to actions brought under Section 1983, *see Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), senior law enforcement officials cannot be held liable for the constitutional violations of their subordinates. The same would hold true for the counties themselves.

The counties can be sued for their own misconduct only if the constitutional violation was caused by an official policy or practice, *id.* at 694, or by a failure to train that amounts to deliberate indifference, *see City of Canton v. Harris*, 489 U.S. 378, 407 (1989).

One can hypothesize a lawsuit on these facts that might allege, and conceivably prove, that failure to purge the database of outdated warrants was sufficiently pervasive that it amounted to a government sanctioned practice manifesting deliberate indiffer-

ence. But even that theoretical option is foreclosed by this Court's ruling that County Sheriff's Departments in Alabama act as an arm of the state when they enforce the criminal law, and are therefore shielded by the state's Eleventh Amendment immunity. *McMillian v. Monroe County*, 520 U.S. 781 (1997). After reviewing Alabama law, the majority in *McMillian* concluded that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." *Id.* at 793.[3]

Finally, on these facts, injunctive relief under Section 1983 is as unlikely to be obtained as money damages. In *City of Los Angeles v Lyons*, 461 U.S. 95 (1983), this Court overturned an injunction issued by a lower federal court prohibiting the use of chokeholds by the Los Angeles Police Department. Lyons filed his action after he had been subjected to a chokehold during a traffic stop. The evidence further showed that more than a dozen people in Los Angeles had died as a result of police chokeholds during a five-year period. Nevertheless, the Court held that the plaintiff had no standing to seek injunctive relief because he could not "establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* at 105. The fact that others were subjected to, and in fact died from, the use of chokeholds did not make up for that deficiency: "The additional allegation in the complaint that the police

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[3] The holding in *McMillian* applied to a county sheriff and his investigator sued in their official capacities, but the same Eleventh Amendment immunity would apply to a suit against a County Sheriff's Department sued as an entity.

in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties." *Id.*

Under *Lyons*, Petitioner would be entitled to injunctive relief only if he could show a likelihood that he would again be the subject of an arrest warrant that was later revoked but not removed from a computer database, and that this outdated information would again become the basis for his subsequent unconstitutional arrest. As numerous post-*Lyons* cases have demonstrated, that showing is nearly impossible to make.

The practical unavailability of both injunctive relief and monetary damages undercuts the lower court's mistaken premise and reinforces the importance of applying of the exclusionary rule for its deterrent effect as well as its other, important justifications.

2. More Generally, Section 1983 Actions Do Not Provide A Substitute Source Of Deterrence.

The lack of an effective Section 1983 remedy in this case is not anomalous. Section 1983 actions are far less common than motions under the exclusionary rule, have a low success rate, and, even when they do succeed, generally do not serve as effective deterrents.

The immunity doctrines and standing rules that have developed over the years have made it "far more difficult" to challenge police misconduct in a civil action than it was a generation ago. Avery, Rudovsky &

Blum, *Police Misconduct: Law and Litigation*, at v (3d ed. 2007). Even where a Section 1983 plaintiff does prevail and wins a substantial judgment against an officer or police department for a significant Fourth Amendment violation, there is no proof that such judgments have more than a negligible deterrent effect.

The reason for this lack of discernable significant deterrence may well be related to the widespread availability of indemnification to protect individual officers from the personal financial consequences of their misconduct. "States and municipalities commonly have policies authorizing indemnification of compensatory damages, with some even authorizing indemnification of punitive damages." Marin A. Schwartz, *Should Juries be Informed that Municipality Will Indemnify Officer's 1983 Liability for Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209, 1223 (2001) (discussing indemnification for compensatory and punitive damages for § 1983 violations by police officers). *See also* Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urb. L.J. 587 (2000) (study of New York City concludes that state municipalities indemnify "police officers in an overwhelming majority of civil rights cases," regardless of "whether they acted intentionally, recklessly, or brutally; whether or not they violated federal or state law; or whether or not they violated the rules and regulations of the New York City Police Department").

Indemnification does not, however, mean that Police Departments themselves bear the brunt of such judgments, either directly or indirectly, in a manner that is likely to produce a deterrent effect. In the first

instance, "City council members, county boards, and city and county administrators . . . bear the financial and political cost." Miller & Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 Buff. L. Rev. 757, 782 (2004). The municipality ultimately paying the price for police misconduct will not necessarily react to an adverse judgment in the same fashion that a private, economically rational actor would, by, for instance, taking steps to prevent the economic cost in the future by pressing for a change in police conduct. Economic analysis shows that governments respond differently to monetary incentives than do individuals, and that political rather than economic theory best explains government misbehavior and the most effective avenues for reducing that behavior. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 355-57 (2000). As a result, while one might think municipalities would act as rational economic actors and extract a price from police departments for such civil judgments, instead "they may even reward police with larger budgets, since the political returns for higher police funding and appearing tough on crime may be worth the budgetary cost." Miller & Wright, *supra*, at 782.

In any event, successful suits under Section 1983 will often send a confusing message to police departments, thereby undermining any deterrent effect. Empirical studies have found that jurors take into account the criminal guilt or innocence of plaintiffs when determining damages in Section 1983 actions for Fourth Amendment violations, contrary to explicit instructions not to do so. Casper, Benedict & Perry, *Juror Decision Making, Attitudes and the Hindsight Bias*, 13 Law & Hum. Behav. 291, 300 (1989). In

other words, the severity of the judgments in Section 1983 cases will often vary based upon a factor unrelated to the severity of the Fourth Amendment violation, namely, how sympathetic the plaintiff appears to the jury. *Id.* The exclusionary rule, by contrast, is linked exactly to the conduct to be deterred.

Motions to suppress, moreover, are far more common than civil rights actions and thus serve more effectively as an ongoing monitor of police misconduct. Approximately 300,000 criminal prosecutions are dismissed or dropped each year due to the exclusionary rule. Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 Ohio St. J. Crim. L. 567, 580 (2008). By contrast, 2,598 "civil rights" cases were filed in federal district courts in 2007, *see 2007 Annual Report of the Director of the Administrative Office of the United States Courts*, at Table C-3, and, of course, only a fraction of those dealt with alleged Fourth Amendment violations. Where one type of remedy—exclusion—is pursued at a rate 100 times greater than the other remedy—civil actions for Fourth Amendment violations—"there is reason to be skeptical that the second can substitute entirely for the first." Sklansky, *supra*, at 580.

In sum, the logic that Section 1983 can substitute for the exclusionary rule as a deterrent to police misconduct does not bear scrutiny: Successful Section 1983 actions are too rare, the grounds for success too fickle, and the consequences of judgment too attenuated for meaningful deterrence.

B. Alabama State Law Remedies

Alabama tort law is no more likely than Section 1983 to provide Petitioner with redress or deter Re-

spondents from repeating the same constitutional violation in the future.

1. The County Sheriff's Departments Cannot Be Held Liable Under Alabama State Law.

Petitioner cannot sue the Sheriff's Departments in either Coffee County or Dale County for the events leading to his arrest and the improper seizure of the evidence. Under Alabama law, county Sheriff's Departments are "not . . . legal entit[ies] subject to suit." *Coleman v. City of Dothan*, 598 So. 2d 873, 875 (Ala. 1992).

2. Neither The Sheriff Nor His Subordinates Could Be Subject To Civil Liability.

Likewise, under Alabama law, a Sheriff cannot be held vicariously liable for any of his subordinate's acts. *See Parker v. Amerson*, 519 So. 2d 442, 442-43 (Ala. 1987) (rejecting not only the application of the theory of *respondeat superior*, but also the legislature's attempts to impose vicarious liability by statute). Thus, even if particular employees acted in an unlawful manner, Alabama law would not permit the Sheriff to be found liable for that conduct.

A suit by Petitioner directed against the arresting officers, or any other Sheriff's Department employees, would be doomed to nearly certain failure. Section 14 of Article I of the Alabama Constitution of 1901 has been held to grant sweeping immunity to state agents. As the Alabama Supreme Court has put it: "The wall of immunity erected by § 14 is nearly impregnable." *Patterson v. Gladwin Corp.*, 835 So. 2d 137, 142 (Ala. 2002).

Article I, Section 14 states: "That the State of Alabama shall never be made a defendant in any court of law or equity." Alabama courts consider a suit against a sheriff or deputy arising from the performance of his or her duties as "essentially a suit against the state." *Ex parte Blankenship*, 893 So. 2d 303, 305 (Ala. 2004). Therefore, where the sheriffs and deputies were acting within the scope of their employment, they are immune from liability. *Ex parte Sumter County*, 953 So. 2d 1235, 1239 (Ala. 2006) (citing *Ex parte Purvis*, 689 So. 2d 794, 795 (Ala. 1996)); *Ex parte Woodward*, 859 So. 2d 425, 427 (Ala. 2003); *Caldwell v. Brogden*, 678 So. 2d 1148, 1150-51 (Ala. Civ. App. 1996) (sheriff's deputy immune from state law suit and § 1983 claim for erroneous arrest based on warrant and deputy's conclusions regarding a fraudulent check).

Indeed, Alabama courts have held expressly that the immunity doctrine applies when the state-agent "exercis[es] judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons." *Ex parte Hudson*, 866 So. 2d 1115, 1119-20 (Ala. 2003) (quoting *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000)). There are only a limited number of enumerated exceptions to this immunity, none of which apply here.[4]

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[4] The five enumerated exceptions to this broad grant of immunity from suit are actions "(1) to compel [the sheriff] to perform his duties; (2) to compel him to perform ministerial acts; (3) to enjoin him from enforcing unconstitutional laws; (4) to enjoin him from acting in bad faith, fraudulently, beyond his authority, or under mistaken interpretation of the law, or (5) to seek construction of a statute under the Declaratory Judgment Act if he is a necessary party for the construction of the statute."

The Alabama Legislature has provided a similar statutory immunity for discretionary acts by "peace officers." Ala. Code § 6-5-338(a); *Ex parte Kennedy*, ___ So. 2d ___, No. 1061377, 2008 WL 1838311, at *3-5 (Ala. Apr. 25, 2008).[5] The statute precludes liability for "those acts as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances." *Thurmond v. City of Huntsville*, 904 So. 2d 314, 319 (Ala. Civ. App. 2004) (internal quotation marks and citations omitted). Pursuant to this provision, the Alabama Supreme Court has shielded law enforcement officials from liability based on alleged negligence (as well as intentional assault, battery, and wrongful death). *See id.*; *Ex parte Kennedy*, 2008 WL 1838311, at *1. The exceptions to this statutory immunity are extremely narrow. *Giambrone v. Douglas*, 874 So. 2d 1046, 1048 (Ala. 2003) (for immunity to be withheld, plaintiff must show that the defendant acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority). The circumstances before the Court would not fall within any exception.

Alexander v. Hatfield, 652 So. 2d 1142, 1143 (Ala. 1994) (internal quotation marks omitted). None of these exceptions allow for damages or other forms of compensation that might, in theory, provide some deterrent effect.

[5] Section 6-5-338(a) reads in relevant part as follows:

> (a) Every peace officer, . . . whether appointed or employed as such peace officer by the state or a county or municipality thereof, . . . shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties.

In sum, state-agent immunity—constitutional, statutory or both—would bar a suit by anyone in Herring's shoes who sought damages from the individuals who acted in apparent good faith to enforce a warrant that appeared valid.

3. The Counties In These Cases Cannot Be Held Liable Under Alabama State Law.

Closing the door further on a potential tort suit, neither Coffee County nor Dale County can be held liable under Alabama state law in this case. While "[a]n Alabama county . . . is not generally immune from suit," *Ex parte Sumter County*, 953 So. 2d at 1238, the counties' relationship to the Sheriff's Departments effectively shield the counties from any liability under the facts of this case. "In Alabama, counties possess only those powers expressly delegated to them by the legislature," *id.*, and the actions of the individual sheriffs or the deputies cannot be imputed to the counties, because a "sheriff is not an employee of a county for the purposes of imposing liability on the county" under a *respondeat superior* theory. *Id.* at 1238-39 (citing Art. V, § 112 of the Alabama Constitution of 1901[6]); *Coleman*, 598 So. 2d at 875; *White v. Birchfield*, 582 So. 2d 1085, 1087 (Ala. 1991). This Court's holding in *McMillian* relied on these state law provisions, among others, in cloaking Alabama

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[6] Article V, § 112 of the Alabama Constitution of 1901 reads as follows: "The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and *a sheriff for each county*." (Emphasis added.)

sheriff's with the state's Eleventh Amendment immunity. 520 U.S. at 786-93.

* * *

The exclusionary rule has been a vital part of this Court's Fourth Amendment jurisprudence since the early twentieth century. It certainly should not be abandoned in this case based on illusory claims about the deterrent effect provided by civil remedies that are effectively unavailable to Herring or anyone else in a similar situation.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), PRIVACY AND CIVIL RIGHTS ORGANIZATIONS, AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF PETITIONER

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Privacy Act of 1974. 5 U.S.C. § 552a ... 28, 31, 32, 33

OTHER AUTHORITIES

ARTHUR MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS (1971) 29

Audrey Hudson, *Air marshals' names tagged on 'no-fly' list*, Wash. Times, Apr. 29, 2008 27

Beverley Lumpkin, *Aviation Security Chief Says No-Fly List is Being Reduced by Half*, Associated Press, Jan. 18, 2007 28

Bob Sullivan, *ChoicePoint files found riddled with errors*, MSNBC, Mar. 8, 2005 19

Bob Sullivan, *Red Tape Chronicles: Bob the Writer, Bob the Molester*, MSNBC, May 3, 2006 20

Bureau of Justice Statistics, *Improving Access to and Integrity of Criminal History Records*, NCJ 200581 (July 2005) 14, 15

Bureau of Justice Statistics, *Improving Criminal History Records for Background Checks* (May 2003) 16

Bureau of Justice Statistics, *Report of the National Task Force on Privacy, Technology and Criminal Justice Information*, NCL 187669 (Aug. 2001) . 14

Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, 2001 Update, NCJ 187670 (Dec. 2001) 14, 15

Charles E. Allen, Chief Intelligence Officer, Dep't of Homeland Sec., *Hearing on the Assessment of Information Sharing Centers Before the Subcomm. on Intelligence, Info. Sharing, & Terrorism, H. Comm. on Homeland Sec.*, 109th Cong. (Sept. 7, 2006) 10

Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) 25, 26

Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background, Vol. 1* (2006) 24

Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background, Vol. 2* (2006). 25

Dep't of Health, Educ. & Welfare, Secretary's Advisory Comm. on Automated Personal Data Systems, *Records, Computers, and the Rights of Citizens* (MIT 1973) 30

Dep't of Homeland Sec., *Notice of Privacy Act System of Records: U.S. Customs and Border Protection, Automated Targeting System*, 72 Fed. Reg. 43,650 (Aug. 6, 2007) 34

Dep't of Justice, Bureau of Justice Statistics, National Criminal History Improvement Program (NCHIP) 15

Dep't of Justice, *Follow-Up Audit of the Terrorist Screening Center, Audit Report 07-41* (Redacted for Public Release) (Sept. 2007) 22, 23, 34

Ellen Nakashima, *A Good Name Dragged Down*, Wash. Post, Mar. 19, 2008 21

EPIC, "Joint Letter and Online Petition: Require Accuracy for Nation's Largest Criminal Justice Database (NCIC)" (Apr. 2003) 1

Exec. Order. No. 13,388, 3 C.F.R. 13,388 (2006). ... 9

Follow-Up Report on INS Efforts to Improve the Control of Nonimmigrant Overstays, Rept. No. I-2002-006 (Apr. 2002) 17

Global Justice Info. Sharing Initiative, Dep't of Justice, *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era -- Guidelines for Establishing and Operating Fusion Centers at the Local, State, and Federal Levels -- Law Enforcement Intelligence,*

Public Safety and the Private Sector (Aug. 2006) 10, 11, 12

Gov't Accountability Office, *Aviation Security: Transportation Security Administration Did Not Fully Disclose Uses of Personal Information during Secure Flight Program Testing in Initial Privacy Notices, but Has Recently Taken Steps to More Fully Inform the Public*, GAO-05-864R (July 22, 2005)..... 27

Gov't Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813 25 (Aug. 2005) 17

Gov't Accountability Office, *Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public*, GAO-06-1031 (Sept. 2006)..... 27

Immigration and Naturalization Service's Ability to Provide Timely and Accurate Alien Information to the Social Security Administration, Rept. No. I-2003-001 (Nov. 2002) 17

Jane Black, *Data Collectors Need Surveillance, Too*, Business Week, Jan. 24, 2002..... 19

Kim Zetter, *Bad Data Fouls Background Checks*, Wired News, Mar. 11, 2005..... 19

Lawyers' Comm. for Civil Rights of the San Francisco Bay, *Complaints Released by Treasury Department*, Mar. 17, 2008..... 21, 22

Leslie Miller, *House Transportation Panel Chairman Latest to be Stuck on No-Fly List*, Associated Press, Sept. 29, 2004..... 28

Letter from Alberto Gonzales, U.S. Atty. Gen., and Michael Chertoff, Sec'y, Dep't of Homeland Sec., to Stockwell Day, Canadian Minister of Public Safety (Jan. 16, 2007) 26

Letter from Virginia R. Canter, Associate Dir., Resource Mgmt., Office of Foreign Assets Control, to Thomas R. Burke, Davis Wright Tremaine LLP (Mar. 17, 2008) 21

Michael Chertoff, Sec'y, Dep't of Homeland Sec., *Remarks at the International Association of Chiefs of Police Annual Conference* (Oct. 16, 2006) 10

Office of Foreign Assets Control, Frequently Asked Questions 20, 21

Office of Inspector Gen., Dep't of Justice, *Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays, Rept. No. I-97-08* (Sept. 1997) 17

Office of Inspector Gen., Soc. Sec. Admin, *Congressional Response Report: Accuracy of the Social Security Administration's NUMIDENT File, A-08-06-26100* (Dec. 18, 2006) 17

Press Release, Federal Bureau of Investigation (July 15, 1999) 14

Privacy Office, Dep't of Homeland Sec., *Report Assessing the Impact of the Automatic Selectee and No Fly Lists on Privacy and Civil Liberties as Required Under Section 4012(b) of the Intelligence Reform and Terrorism Prevention Act of 2004* (Apr. 27, 2006) 23

Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* (July 1977).. 32

Ryan Singel, *Nun Terrorized by Terror Watch*, Wired News, Sept. 26, 2005 24

S. Rep. No. 93-1183 (1974)..... 30, 31

SAMUEL ALITO, THE BOUNDARIES OF PRIVACY IN AMERICA (1972) ("Report of the Chairman") 36

Sara Kehaulani Goo, *Committee Chairman Runs Into Watch-List Problem*, Wash. Post, Sept. 30, 2004 28

Shaun Waterman, *Senator Gets a Taste of No-Fly List Problems*, United Press Int'l, Aug. 20, 2004 28

The Computer and the Invasion of Privacy: Hearings Before a Subcom. of the H. Comm on Gov't Operations, 89th Cong. (1966)..... 29

Thomas E. Bush III, Assistant Dir., Criminal Justice Info. Serv. Div., *Statement Before the S. Comm. on Homeland Sec. & Gov'tal Affairs*, 109th Cong. (June 29, 2005) 22

Todd Masse, Siobhan O'Neil & John Rollins, Cong. Research Serv., *Fusion Centers: Issues and Options for Congress, RL34070* (July 6, 2007) 9, 10

Transp. Sec. Admin., Dep't of Homeland Sec., *Complaint Log: Nov. 2003 to May 2004*..... 23

INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as *amici* in several cases before this Court, and other courts, concerning privacy issues and new technologies. EPIC has a particular interest in the accuracy of government databases as it has routinely urged federal agencies to comply with the Privacy Act accuracy requirements. *See, e.g.*, Online Petition to Mitchell E. Daniels, Jr., Director, Office of Management and Budget (Apr. 7, 2003).[2]

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. In accordance with Rule 37.6 it is stated that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. EPIC IPIOP clerk Sobia Virk assisted in the preparation of this brief.

[2] EPIC, "Joint Letter and Online Petition: Require Accuracy for Nation's Largest Criminal Justice Database (NCIC)" (Apr. 2003) ("We strongly oppose the Justice Department's recent decision to lift the Privacy Act requirement that the FBI ensure the accuracy and completeness of the over 39 million criminal records it maintains in its National Crime Information Center

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(NCIC) database."), *available at* http://epic.org/privacy/ncic/.

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Amici Civil Liberties and Privacy Organizations

The Asian American Justice Center is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. AAJC and its Affiliates have a long-standing interest in this case because the inaccuracy of government databases have a significant impact on implementation of the laws and policies as they are applied to the Asian American community, and this interest has resulted in AAJC's participation in a number of administrative rulemaking comments and *amicus* briefs before the courts.

The Asian American Legal Defense and Education Fund, founded in 1974, defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information.

The Center for Democracy & Technology is a non-profit, non-partisan public interest organization dedicated to developing and implementing public policies to protect and advance civil liberties and democratic values on the Internet and in the digital age.

The Electronic Frontier Foundation is a non-profit, member-supported civil liberties organization working to protect rights in the digital world.

The Gun Owners of America is a national grassroots lobby organization defending the Second Amendment in Congress and the Courts.

The Identity Project provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights.

The Liberty Coalition works to help organize, support, and coordinate transpartisan public policy activities related to civil liberties and basic rights. We work in conjunction with groups of partner organizations that are interested in preserving the Bill of Rights, personal autonomy and individual privacy.

The Multiracial Activist is a libertarian oriented activist journal focusing on civil liberties issues, multiracial individuals and interracial families.

The National Federation of Filipino American Associations is a nonprofit, nonpartisan civil rights organization dedicated to promoting the interests

and betterment of Filipinos and Filipino Americans in the United States and to ensure that Asian Pacific Americans enjoy equal opportunities in education, employment, and industry.

The National Immigration Law Center is a national legal advocacy organization whose mission is to protect and promote the rights and opportunities of low-income immigrants and their families.

OpenTheGovernment.org is a coalition of consumer and good government groups, journalists, environmentalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

The Rutherford Institute is a non-profit conservative legal organization dedicated to the defense of civil, especially religious, liberties and human rights.

The Workmen's Circle/Arbeter Ring is a 107-year-old national Jewish organization dedicated to Jewish culture, community and social justice.

SUMMARY OF THE ARGUMENT

The technology of government databases has changed dramatically since 1995, when the Court upheld the use of evidence obtained from an erroneous arrest record that was the product of a clerical mistake. Today, the police have within their electronic reach access to an extraordinary range of databases including: the National Crime Information Center, systems associated with the federal government's employment eligibility verification system, terrorist watch lists and various commercial databases.

These government and commercial databases are filled with errors, according to the federal government's own reports. Yet the government has further compounded the problems with record inaccuracies with two decisions: first, the increased distribution of the data not just among government agencies but among federal, state, local, tribal and commercial entities; and second, the exemption of database systems from important privacy and accuracy requirements set out in federal laws. To allow law enforcement agencies to rely on inaccurate data will exacerbate further a problem that implicates both the fairness of the criminal justice system as well as the design and operation of government information systems.

Given the consequences that may flow from law enforcement officials acting upon errors in these systems, *amici* believe it is critical for the Court to ensure an accuracy obligation on law enforcement agents who rely on criminal justice information systems. In this context, to permit a good faith reliance on data that is inaccurate, incomplete, or out of date will actually exacerbate the problem

and increase the likelihood of unfair treatment in the criminal justice system.

ARGUMENT

Justice O'Connor's concurrence in *Arizona v Evans* stated clearly the danger of reliance on error-prone recordkeeping systems. *Arizona v. Evans*, 514 U.S. 1, 16-17 (1995):

> [w]hile the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance *on the recordkeeping system itself*. Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).

Id. at 17 (emphasis in original).

As technology evolves, law enforcement officials are increasingly using a vast, cross-referenced system of public and private databases, which contains numerous errors. In these interlinked databases, one error can spread like a disease, infecting every system it touches and condemning the individual to whom this error refers to suffer substantial delay, harassment, and improper arrest. Accuracy requirements ensure not only fairness in the criminal justice system, but also the effective and efficient use of law enforcement resources. In the absence of such obligations, more individuals will be subject to improper arrest as the data on which the criminal justice system depends

becomes increasingly outdated, incomplete, and inaccurate.

I. In Recent Years, There Has Been a Dramatic Expansion of Law Enforcement Databases

In recent years, there has been an increase in information sharing not just among government agencies but among federal, state, local, tribal and commercial entities. The broad data-gathering and sharing through the Information Sharing Environment and the state and local fusion centers has changed the policies and practices of modern-day policing. Today's law enforcement interactions do not merely involve one sheriff's clerk calling a clerk in another county. Instead, law enforcement personnel access a massive interconnected web of databases that contains myriad inaccurate data, which can provide the basis for wrongful arrests.

A. The Rise of the Information Sharing Environment

In December 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004, which directed the president to "create an information sharing environment for the sharing of terrorism information in a manner consistent with national security and with applicable legal standards relating to privacy and civil liberties." Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004). Notably, the Act defined "information sharing environment" as "an approach that facilitates the sharing of terrorism information, which approach may include any methods determined necessary and appropriate for carrying out this section." *Id.*

In October 2005, President George W. Bush issued Executive Order 13,388, "Further Strengthening the Sharing of Terrorism Information To Protect Americans," which created the Information Sharing Environment among these many entities. Exec. Order. No. 13,388, 3 C.F.R. 13,388 (2006). The Information Sharing Environment Program (managed by former Ambassador Thomas E. McNamara) was placed under the Office of the Director of National Intelligence (J. Mike McConnell).

B. State Fusion Centers Pose Unique Challenges to Criminal Justice Recordkeeping

An outgrowth of the expansion of criminal justice data sharing has been "fusion centers," which have received $380 million in federal grants and millions more from state governments. Todd Masse, Siobhan O'Neil & John Rollins, Cong. Research Serv., *Fusion Centers: Issues and Options for Congress, RL34070* 20, 93 (July 6, 2007) [hereinafter "CRS Fusion Centers Report"]. There are 43 current and planned fusion centers in the U.S., and some states have more than one. *Id.* at 2.

State fusion centers began as "the outgrowth or expansion of an existing intelligence and/or analytical unit or division within the state's law enforcement agency." *Id.* at 19. However, the presence of Department of Homeland Security ("DHS") officials has grown. The agency has "embedded" federal officials at many local and state fusion centers, and has said it seeks to deploy federal staff to all of them. Charles E. Allen, Chief Intelligence Officer, Dep't of Homeland Sec., *Hearing on the Assessment of Information Sharing Centers Before the Subcomm. on Intelligence, Info.*

Sharing, & Terrorism, H. Comm. on Homeland Sec., 109th Cong. (Sept. 7, 2006) [hereinafter "DHS Testimony on Fusion Centers"].

In a July 2007 report, the Congressional Research Service ("CRS") interviewed "the majority of state fusion center leaders and operational directors . . . [and] stakeholders within the federal government" to learn more about fusion centers. CRS Fusion Centers Report at 93. CRS found that, though local and state fusion centers were originally designed to be local- or state-wide in jurisdiction and purely oriented toward counterterrorism, "they have increasingly gravitated toward an all-crimes and even broader all-hazards approach." *Id.* at i. A part of this broadening of fusion center missions is the DHS's goal of creating a "national network" of fusion centers, said Michael Chertoff, Secretary of DHS. Michael Chertoff, Sec'y, Dep't of Homeland Sec., *Remarks at the International Association of Chiefs of Police Annual Conference* (Oct. 16, 2006).

The federal Fusion Center Guidelines recommend that fusion centers "allow for future connectivity to other local, state, tribal, and federal systems." Global Justice Info. Sharing Initiative, Dep't of Justice, *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era -- Guidelines for Establishing and Operating Fusion Centers at the Local, State, and Federal Levels -- Law Enforcement Intelligence, Public Safety and the Private Sector* 2 (Aug. 2006) [hereinafter "DOJ Fusion Center Guidelines"]. Also, the federal Guidelines recommend that, "nontraditional collectors of intelligence, such as public safety

entities and private sector organizations" could be "'fused' with law enforcement data."[3] *Id.* at 3.

The federal Fusion Center Guidelines recommend that state fusion centers collect information on:

> Agriculture, Food, Water and the Environment, Banking and Finance, Chemical Industry and Hazardous Materials, Criminal Justice, Retail, Real Estate, Education, Emergency Services (Non-Law Enforcement), Energy, Government, Health and Public Health Services, Hospitality and Lodging, Information & Telecommunications, Military Facilities and Defense Industrial Base, Postal and Shipping, Private Security, Public Works, Social Services, [and] Transportation.

Id. at C-1.

State fusion centers can find this data by accessing a variety of government and commercial systems, such as:

- Driver's license,
- Motor vehicle registration,
- Location information (411, addresses, and phone numbers),
- Law enforcement databases,
- National Crime Information Center (NCIC),

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[3] We note, but will not discuss the fact that use of private sector data in a national network of fusion centers raises the possibility that such data could be misused, allowing the government to circumvent warrant requirements and state or federal privacy laws or regulations. This possibility is not directly relevant to the issue at hand, but is still important.

- Nlets -- The International Justice and Public Safety Information Sharing Network, and the Terrorist Screening Center (TSC),
- Criminal justice agencies,
- Public and private sources (Security Industry databases, Identity Theft databases, Gaming Industry databases),
- Regional Information Sharing Systems (RISS)/Law Enforcement Online (LEO), U.S. Department of Homeland Security's (DHS) Homeland Security Information Network (HSIN), including the United States Private-Public Partnership (USP3) – formerly HSIN-CI. (Note: RISS, LEO, and DHS's HSIN are currently collaborating on a network capability.),
- Organizational and association resources (InfraGard, The Infrastructure Security Partnership),
- Corrections,
- Sex offender registries,
- Violent Criminal Apprehension Program (VICAP),
- Health- and Public Health-Related Databases (Public Health Information Network, Health Alert Network). *Id.* at 33-34.

This increased data dissemination is problematic for many reasons, including the fact that fusion centers use erroneous information culled from government and commercial databases. Moreover, law enforcement personnel rely on these new integrated state databases even as states are suspending the privacy obligations and open government requirements that would otherwise require public accountability in the management of these systems. In the state of Virginia, for example, legislation was recently enacted that would

suspend the application of the Virginia Freedom of Information Act and the Virginia Collection and Dissemination Practices Act to the Virginia Fusion Center. H.B. 1007, 2008 Gen. Assem., Spec. Sess. (Va. 2008). In other words, at the same time that the states are incorporating new technology that makes possible the expansion of data exchange in the criminal justice system, they are seeking to remove the legal obligations that would help ensure accuracy, reliability and accountability. It is this problem that is squarely before the Court in this case.

II. Numerous Reports Detail Numerous Errors in Government and Commercial Databases

Increasingly, law enforcement officials and other government employees are relying on government and commercial databases full of mistakes that are well-documented but rarely corrected. Government systems include the National Crime Information Center database and databases associated with the federal government's employment eligibility verification system. Commercial databases include information from databrokers such as Choicepoint. As these errors are distributed to various law enforcement and other groups through the Information Sharing Environment and fusion centers, enormous difficulties are created for innocent individuals.

A. Problems with the National Crime Information Center ("NCIC")

The National Crime Information Center ("NCIC") is a system that makes criminal history information widely available to police officers and law enforcement officials across the United States.

See generally Bureau of Justice Statistics, *Report of the National Task Force on Privacy, Technology and Criminal Justice Information*, NCL 187669, at 47 (Aug. 2001); *see also* Press Release, Federal Bureau of Investigation (July 15, 1999).

The problem of record accuracy has plagued the system for years. According to the Bureau of Justice Statistics, "[i]n the view of most experts, inadequacies in the accuracy and completeness of criminal history records is *the single most serious deficiency* affecting the Nation's criminal history record information systems." Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, 2001 Update, NCJ 187670 at 38 (Dec. 2001) (emphasis added).

In a 2005 report (the most recent report), the Department of Justice Bureau of Justice Statistics ("BJS") detailed ongoing concerns about errors in NCIC databases. Bureau of Justice Statistics, *Improving Access to and Integrity of Criminal History Records*, NCJ 200581 (July 2005). The BJS points to problems with State criminal history records, which are fed into the NCIC. "Recent BJS surveys have suggested that criminal history repositories are encountering several problems including significant backlogs, older records that have no dispositions, and infrequent audits to ensure accuracy of records." *Id.* at 11. Also, "Repositories in States that could estimate the size of their backlogs in 2001 reported that 2.5 million records of arrest, disposition, and custody information were unprocessed or only partially processed." *Id.* at 13.

Though the errors are well-known, the BJS found that audits of these records are infrequent. "In 2001, 23 State criminal history repository

directors reported that their databases had not been audited for completeness in the prior 5 years. [...] Over half of those States (13) reported that they had not planned or scheduled a data quality audit to occur within the next 3 years. Overall, 24 States did not plan to perform a data quality audit within 3 years of the survey." *Id.*

The BJS said in 2001 that, if incomplete or inaccurate records are used *"there is a substantial risk that the user will make an incorrect or misguided decision."* *Id* (emphasis added). Because the criminal history information is available to both private and public entities, misguided decisions may lead to an unjustified arrest, a lost employment opportunity, or inability to purchase a firearm. *Id.* There have not been many "in-depth audits or reviews of the accuracy of the information maintained by State and Federal criminal history record repositories" conducted, according to the report, but "most of those that have been conducted have found unacceptable levels of inaccuracies." *Id.* at 39.

The Department of Justice has sought to address concerns about record accuracy through the National Criminal History Improvement Program ("NCHIP"). Dep't of Justice, Bureau of Justice Statistics, National Criminal History Improvement Program (NCHIP).[4] The goal of the program is to "insure that accurate records are available for use in law enforcement," and to provide "direct funding and technical assistance to the States to improve the quality, timeliness and immediate accessibility of criminal history and related records." *Id.* Between 1995 and 2002, more

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[4] http://www.ojp.usdoj.gov/bjs/nchip.htm (last visited May 6, 2008).

than $390 million dollars were allocated under the NCHIP program. Bureau of Justice Statistics, *Improving Criminal History Records for Background Checks* (May 2003).[5]

Nonetheless, as the 2005 BJS report makes clear, record accuracy continues to plague the criminal justice system. And with the continued expansion of the NCIC and the growth of fusion centers, the problem will become more severe.

B. Problems with Databases Associated with the Federal Government's Employment Eligibility Verification System

The problem of record accuracy reaches across the federal government. Several reports highlight inaccuracies in the government database used for employment verification. The errors in the federal government's employment eligibility verification system ("EEVS") are so egregious and their effects so significant, that a federal judge cited to them in an opinion granting a temporary restraining order against the Department of Homeland Security.

The government reports documenting the errors in databases connected with EEVS date back more than 10 years. In a 1997 report and a 2002 follow-up review, the Inspector General of the Department of Justice found that data from the Immigration and Naturalization Service (the predecessor of U.S. Citizenship and Immigration Services) were unreliable and "seriously flawed in content and accuracy." Office of Inspector Gen., Dep't of Justice, *Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays,*

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[5] *Available at* http://www.ojp.gov/bjs/abstract/ichrbc.htm (last visited May 6, 2008).

Rept. No. I-97-08 (Sept. 1997); *Follow-Up Report on INS Efforts to Improve the Control of Nonimmigrant Overstays, Rept. No. I-2002-006* (Apr. 2002); and *Immigration and Naturalization Service's Ability to Provide Timely and Accurate Alien Information to the Social Security Administration, Rept. No. I-2003-001* (Nov. 2002).

In August 2005, the Government Accountability Office investigated and found myriad errors in information from DHS databases searched through its employment eligibility verification system. Gov't Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813 25 (Aug. 2005).

A December 2006 report by the Social Security Administration's Office of Inspector General found accuracy problems in databases of Citizenship and Immigration Services and Social Security Administration. Office of Inspector Gen., Soc. Sec. Admin, *Congressional Response Report: Accuracy of the Social Security Administration's NUMIDENT File, A-08-06-26100* (Dec. 18, 2006). The Inspector General estimated that about 17.8 million records in the Social Security Administration's Numerical Identification File ("NUMIDENT") have discrepancies with name, date of birth or death, or citizenship status. *Id.* at 6. About 13 million of these incorrect records belong to U.S. citizens, he said. *Id.* at Appendix C-2.

A federal judge pointed to the problems in NUMIDENT in an October 2007 opinion granting a temporary restraining order enjoining the Department of Homeland Security from implementing a new "no-match" employment eligibility verification proposal.

> As demonstrated by plaintiffs, the government's proposal to disseminate no-match letters affecting more than eight million workers will, under the mandated time line, result in the termination of employment to lawfully employed workers. This is so because, as the government recognizes, the no-match letters are based on SSA records that include numerous errors.

AFL-CIO v. Chertoff, No. C 07-04472 CRB 7 (N.D. Cal. 2007).

It is clear that the federal government's employment eligibility verification system is based on erroneous databases. As fusion centers continue to mix and mingle data from a multitude of government databases, such information is becoming more accessible to law enforcement officials in the criminal justice context. This strongly implicates the accuracy and reliability of the criminal justice system.

Multiple government assessments state that the watch lists remain filled with errors. The Justice Department Inspector General has said this indicates "a deficiency in the integrity of watchlist information." Justice Dept. Report on Watch Lists at xxii. These watch lists are used to screen "approximately 270 million individuals . . . each month." *Id.* at v. Such mistakes show it is paramount that government entities are held accountable for accuracy of their databases.

C. Commercial Databases on Which Law Enforcement Rely Are Also Inaccurate and Incomplete

There is extensive documentation of errors in commercial databases, as well. The government

has increasingly relied upon these databases in its law enforcement activities and, as explained earlier, the federal Fusion Center Guidelines urge the intermingling of commercial data with information culled from government systems. For example, databroker Choicepoint trumpets on its Web site the various federal, state, local and law enforcement "solutions" that the company offers.[6] These reports often include information that is erroneous, out of date, incomplete, unreliable, or just flat-out false.

A man bought his Choicepoint record and found that the file showed he had died in 1976. Jane Black, *Data Collectors Need Surveillance, Too*, Business Week, Jan. 24, 2002. Another man's report included numerous crimes that he never committed. "In Florida I'm a female prostitute (named Ronnie); in Texas I'm currently incarcerated for manslaughter," according to the man. Kim Zetter, *Bad Data Fouls Background Checks*, Wired News, Mar. 11, 2005. Also, "In New Mexico I'm a dealer of stolen goods. Oregon has me as a witness tamperer. And in Nevada -- this is my favorite -- I'm a registered sex offender." *Id.*

Another Choicepoint file contained significant errors. The record of one woman listed "possible Texas criminal history" even though she has been to Texas only twice and has not been charged with or committed crimes there. Bob Sullivan, *ChoicePoint files found riddled with errors*, MSNBC, Mar. 8, 2005. Her record also included "three automobiles she never owned and three companies listed that she never owned or worked for." *Id.*

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[6] http://www.choicepoint.com/ (last visited May 6, 2008).

When a news reporter looked up his file on databroker Intellius.com, he found the record said he was charged with child molestation (he wasn't) and that he had a close male relative who was convicted of manslaughter (the reporter had never even heard of the man). Bob Sullivan, *Red Tape Chronicles: Bob the Writer, Bob the Molester*, MSNBC, May 3, 2006.

These are just a few of the many erroneous records that have been compiled by Choicepoint and other databrokers used by the federal government for law enforcement purposes.

D. Problems with Terrorist Watch Lists

The federal government manages at least three terrorist watch lists: the no-fly and selectee lists, which are managed by the Terrorist Screening Center, and the Specially Designated Nationals and Blocked Persons ("SDN") list, which is managed by the Treasury Department's Office of Foreign Assets Control ("OFAC"). All of these lists have been criticized for their errors, which can be compounded by the opacity of the process behind the lists.

1. Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons ("SDN") List

According to OFAC, the SDN list "includes over 6,000 names of companies and individuals who are connected with the sanctions targets and are located throughout the world." Office of Foreign Assets Control, Frequently Asked Questions.[7] "U.S. persons are prohibited from dealing with SDNs

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[7] http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml (last visited May 6, 2008).

wherever they are located and all SDN assets are blocked." *Id.* This list has caused significant problems because an increasing number of individuals are mismatched to this list as private businesses, such as banks, car dealerships, employers and landlords, run applicants' names against the SDN list.

In March, the Treasury Department released documents under a Freedom of Information Act request from the Lawyers' Committee for Civil Rights of the San Francisco Bay area. Letter from Virginia R. Canter, Associate Dir., Resource Mgmt., Office of Foreign Assets Control, to Thomas R. Burke, Davis Wright Tremaine LLP (Mar. 17, 2008).[8] Included in the documents were complaints from individuals who had been denied mortgages or otherwise negatively affected because they were mistakenly matched to a name on the OFAC list and a "red flag" or some other alert was put on their credit reports. *Id. See also*, Ellen Nakashima, *A Good Name Dragged Down*, Wash. Post, Mar. 19, 2008.

A former Naval officer, a police officer and a 30-year employee of the Department of Defense were among the individuals who were mistakenly matched and who had difficulty getting the SDN label off their credit reports. Lawyers' Comm. for Civil Rights of the San Francisco Bay, *Complaints Released by Treasury Department*, Mar. 17, 2008.[9] These individuals contacted OFAC, the FBI, and their Congressional representatives in efforts to clear their names. The complaints reveal the

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[8] http://www.lccr.com/3%2018%2008%20Treasury%20Dept%20Cover%20Letter.pdf (last visited May 6, 2008).

[9] http://www.lccr.com/OFAC%20complaints%203-18-08.pdf (last visited May 6, 2008).

process is cumbersome and painstaking, and no one is sure how exactly an individual is "cleared off the list." *Id.* OFAC tells individuals who are branded with the SDN label to contact each credit-reporting agency, because OFAC does not "clear" individuals. But then there is confusion and difficulty when the credit-reporting agencies, such as Experian, are contacted.

2. No-Fly and Selectee Lists

The Terrorist Screening Center coordinates the "no-fly" and "selectee" watch lists, which are most well-known for their use by airport security. These lists are also included in the NCIC, which is widely used by police. Thomas E. Bush III, Assistant Dir., Criminal Justice Info. Serv. Div., *Statement Before the S. Comm. on Homeland Sec. & Gov'tal Affairs*, 109th Cong. (June 29, 2005). Several government reports have reviewed the watch list process and the lists themselves and significant problems were found.

In September 2007, the Justice Department's Inspector General's review of the Terrorist Screening Center found that the government's watch lists of known or suspected terrorists remain filled with errors that the Inspector General said could obstruct the capture of terrorists. Office of Inspector General, Dep't of Justice, *Follow-Up Audit of the Terrorist Screening Center, Audit Report 07-41* (Redacted for Public Release) (Sept. 2007) [hereinafter "Justice Dept. Report on Watch Lists"]. "Furthermore, inaccurate, incomplete, and obsolete watchlist information increases the chances of innocent persons being stopped or detained during an encounter because of being misidentified as a watchlist identity." *Id.* at iii.

The Inspector General was highly critical of the system, detailing a number of errors in the watch lists and said the data collection and dissemination structure helped cause "inaccurate and incomplete watchlist records." *Id.* at ii-iii, 61. In fact, problems at the Center meant that "several known or suspected terrorists" were not on the lists, though they should be. *Id.* at ii. The Inspector General said, "The results of our testing of watchlist records, as well as the TSC finding that many records involved in its redress reviews required modification or removal, *indicate a deficiency in the integrity of watchlist information*" (emphasis added). *Id.* at xxii.

An April 2006 report by the Department of Homeland Security's Privacy Office on the impact of the watch lists explained that "individuals who are mistakenly put on watch lists or who are misidentified as being on these lists can potentially face consequences ranging from inconvenience and delay to loss of liberty." Privacy Office, Dep't of Homeland Sec., *Report Assessing the Impact of the Automatic Selectee and No Fly Lists on Privacy and Civil Liberties as Required Under Section 4012(b) of the Intelligence Reform and Terrorism Prevention Act of 2004* i (Apr. 27, 2006). The report described complaints "alleg[ing] misconduct or disrespect by airline, law enforcement, TSA or CBP officials" toward people mistakenly matched. *Id.* at 18.

Also, documents obtained by EPIC under the Freedom of Information Act show nearly a hundred complaints from airline passengers between November 2003 and May 2004 about the government's traveler screening security measures. Transp. Sec. Admin., Dep't of Homeland Sec., *Complaint Log: Nov. 2003 to May 2004*, obtained by

EPIC through FOIA litigation.[10] The complaints describe the bureaucratic maze passengers encounter if they happen to be mistaken for individuals on the list, as well as the difficulty they encounter trying to exonerate themselves through the redress process. One person named in the documents, Sister Glenn Anne McPhee, U.S. Conference of Catholic Bishops' secretary for education, spent nine months attempting to clear her name from a TSA watch list. The process was so difficult, Sister McPhee told a reporter, "Those nine months were the closest thing to hell I hope I will ever experience." Ryan Singel, *Nun Terrorized by Terror Watch*, Wired News, Sept. 26, 2005.

In a highly publicized case, a Canadian named Maher Arar brought the dangers of the error-filled watch lists to the world's attention. In September 2002, Arar was detained, interrogated and imprisoned for 12 days in the U.S, while en route home from a family holiday in Tunisia. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background, Vol. 1* 149 (2006).[11] The U.S. authorities used wholly erroneous data gathered by Canadian police and intelligence officials in its investigation of Arar.

After the 12 days of detention in the U.S., Arar was then handcuffed and shackled, put on a private jet, and flown to Syria where he was subjected to intense interrogation and locked in a tiny, grave-

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[10] *Available at* http://www.epic.org/privacy/airtravel/foia/complaint_log.pdf (last visited May 6, 2008).

[11] *Available at* http://www.ararcommission.ca/eng/Vol_I_English.pdf (last visited May 6, 2008).

like cell for more than 10 months. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background, Vol. 2* 470-73 (2006).[12] In October 2003, he was finally released and sent back to Canada. *Id.* After extensive public pressure, the Canadian government agreed in January 2004 to an inquiry into the Arar case.

In 2006, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar released a report detailing the erroneous evidence and the effect of disseminating this data through an information sharing structure among the Royal Canadian Mounted Police ("RCMP"), Canadian Security Intelligence Services ("CSIS") U.S. Federal Bureau of Investigation ("FBI"). Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006). "The RCMP provided American authorities with information about Mr. Arar that was inaccurate, portrayed him in an unfairly negative fashion and over-stated his importance in the RCMP investigation," the Commission said. *Id.* at 13. While Arar was detained in New York, "the RCMP provided the U.S. Federal Bureau of Investigation (FBI) with information about him, some of which portrayed him in an inaccurate and unfair way." *Id.* at 14. Also, data sent from Canadian officials "indicated that Mr. Arar had been in the vicinity of

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[12] *Available at* http://www.ararcommission.ca/eng/Vol_II_English.pdf (last visited May 6, 2008).

Washington, D.C. on September 11, 2001, which was false." *Id.* at 28.

Also, the U.S. was told that "Arar had declined to be interviewed in January 2002 and, soon after, had suddenly left Canada for Tunisia." This information was false. *Id.* at 28. In the end, the Commission of Inquiry Judge Dennis O'Connor, who led the investigation, concluded, "I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada." *Id.* at 59. Even after a request from the Canadian government to remove him from the list, the U.S. has kept Arar on its watch list. Even though Arar had been cleared by Canada and even though the U.S. did not have enough evidence to charge Arar with a crime, "We remain of the view that the continued watch listing of Mr. Arar is appropriate," wrote then-Attorney General Alberto Gonzales and DHS Secretary Michael Chertoff in a letter to the Canadian prime minister. Letter from Alberto Gonzales, U.S. Atty. Gen., and Michael Chertoff, Sec'y, Dep't of Homeland Sec., to Stockwell Day, Canadian Minister of Public Safety (Jan. 16, 2007). Arar remains on the U.S. watch list.

In 2005, Congress ordered the Government Accountability Office ("GAO") to investigate TSA's airline passenger screening programs. GAO found significant problems with handling of personal information and violations of privacy laws. Gov't Accountability Office, *Aviation Security: Transportation Security Administration Did Not Fully Disclose Uses of Personal Information during Secure Flight Program Testing in Initial Privacy Notices, but Has Recently Taken Steps to More Fully Inform the Public*, GAO-05-864R (July 22,

2005). In September, GAO reviewed the watch list system and found "about half of the tens of thousands of potential matches sent to the center between December 2003 and January 2006 for further research turned out to be misidentifications." Gov't Accountability Office, *Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public*, GAO-06-1031 (Sept. 2006). According to the GAO, these misidentifications are a significant problem, and they:

> highlight the importance of having a process -- often referred to as redress -- for affected persons to express their concerns, seek correction of any inaccurate data, and request other actions to reduce or eliminate future inconveniences. Similarly, such a process would apply to other persons affected by the maintenance of watch list data, including persons whose names are actually on the watch list but should not be ("mistakenly listed persons") as well as persons who are properly listed.

Id. at 2.

Even federal air marshals are stymied by these watch lists. A recent news report described how air marshals have been kept off flights that they were assigned to protect because the air marshals' names were mistakenly matched to watch lists. Audrey Hudson, *Air marshals' names tagged on 'no-fly' list*, Wash. Times, Apr. 29, 2008. In January 2007, at a hearing of the Senate Commerce Committee, Sen. Ted Stevens complained that his wife, Catherine, is frequently mismatched to the watch list name "Cat Stevens." Beverley Lumpkin,

Aviation Security Chief Says No-Fly List is Being Reduced by Half, Associated Press, Jan. 18, 2007.

Senators Ted Kennedy and Representative Don Young are among those who have been improperly flagged by watch lists. Sen. Kennedy was able to resolve the situation only by enlisting the help of then-Homeland Security Secretary Tom Ridge. *See, e.g.*, Sara Kehaulani Goo, *Committee Chairman Runs Into Watch-List Problem*, Wash. Post, Sept. 30, 2004; Leslie Miller, *House Transportation Panel Chairman Latest to be Stuck on No-Fly List*, Associated Press, Sept. 29, 2004; Shaun Waterman, *Senator Gets a Taste of No-Fly List Problems*, United Press Int'l, Aug. 20, 2004.

III. Federal Government Is Increasingly Exempting Databases From Accuracy and Privacy Requirements

Even though the federal Privacy Act makes clear the need to ensure accurate records and the federal government recognizes that these databases are filled with errors, that has not stopped federal agencies from increasingly attempting to exempt themselves from Privacy Act of 1974, 5 U.S.C. 552a, provisions that require record accuracy. The agencies attempt to exempt themselves under §552a(j) (general exemptions) and §552a(k) (specific exemptions). Privacy Act of 1974, 5 U.S.C. §§ 552a(j), (k). Such exemptions from the general accuracy requirements applicable to government record-keeping systems undermine the argument that there are alternatives to the exclusionary rule that will produce the appropriate level of accuracy. Two prominent examples of such exempt systems are the NCIC database and the Automated Targeting System.

A. Federal Privacy Act Accuracy Obligations

The need to ensure the accuracy of personal information maintained by law enforcement agencies has long been a central concern in the development of privacy protection in the United States. *See, e.g., The Computer and the Invasion of Privacy: Hearings Before a Subcom. of the H. Comm on Gov't Operations*, 89th Cong. (1966) (discussing, among various topics, "Information Sharing: The Hidden Challenge in Criminal Justice"); ARTHUR MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 36 (1971) ("The problem of contextual accuracy is certain to become more severe in the future as increasing numbers of remote terminals are linked to computer systems and local and regional data centers are amalgamated into national or international networks.").

The seminal 1973 report on privacy and government record-keeping, *Records, Computers, and the Rights of Citizens*, found that:

> In practice, however, the NCIC, like the National Driver Register, does not have effective control over the accuracy of all the information in its files. The NCIC is essentially an automated receiver, searcher, and distributor of data furnished by others. If a subscribing system enters a partially inaccurate record, or fails to submit additions to the NCIC files (e.g. the recovery of a stolen vehicle or the disposition of an arrest), there is not much the NCIC can do about it.

Dep't of Health, Educ. & Welfare, Secretary's Advisory Comm. on Automated Personal Data

Systems, *Records, Computers, and the Rights of Citizens* 17-18 (MIT 1973).

The report went on to say that: "Furthermore, the risk of propagating information that may lead to unjust treatment of an individual by law enforcement authorities in subscribing jurisdictions cannot be fully prevented." *Id.*

The report concluded that:

> Systems like the NCIC and the National Data Registry illustrate one of the potentially most significant effects of computerization of personal-data record keeping—the enhanced ability to gather, package and deliver information from one organization to another in circumstances where lines of authority and responsibility are overlapping or ambiguous, and where the significance attached to data disseminated by the system may vary among subscribing organizations. *Unless all organizations in a multi-jurisdictional system can be counted on to interpret and use data in the same way, the likelihood of unfair or inappropriate decisions about the individual to whom any given record pertains will be a problem*, and a particularly acute problem whenever records are incomplete or compressed.

Id. at 18-19 (emphasis added).

When it enacted the Privacy Act in 1974, Congress sought to address this problem and to impose clear obligations on Federal agencies that collect personal data and required agencies to be transparent in their information practices. S. Rep. No. 93-1183 at 1 (1974). In 2004, this Court underscored the importance of the Privacy Act's restrictions upon agency use of personal data to protect privacy interests, noting that:

> "[I]n order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary . . . to regulate the collection, maintenance, use, and dissemination of information by such agencies." Privacy Act of 1974, §2(a)(5), 88 Stat. 1896. The Act gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the requirements.

Doe v. Chao, 540 U.S. 614, 618 (2004).

The Privacy Act is intended "to promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government[.]" S. Rep. No. 93-1183 at 1. It is also intended to guard the privacy interests of citizens and lawful permanent residents against government intrusion. Congress found that "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies," and recognized that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States." 5 U.S.C. § 552a. It thus sought to "provide certain protections for an individual against an invasion of personal privacy" by establishing a set of procedural and substantive rights. *Id.*

Among the most important obligations contained within the Privacy Act is the requirement that each agency that maintains a system of records shall:

> Maintain all records which are used by the agency in making decisions about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

5 U.S.C. §552a(e)(5).

But the problem continued, even after passage of the Privacy Act. As early as 1977, the Privacy Protection Study Commission (created by the Privacy Act of 1974), detailed ongoing problems with criminal justice information systems. Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* (July 1977). One problem "emerges from even the briefest consideration of how information enters criminal justice systems and how it is used," the Commission said. *Id.* at 534. The Commission noted that there can be "little control over the accuracy and reliability of information when it passes from one information agency to another." *Id.* This is significant because criminal history information is "often the most revealing and potentially the most damaging recorded information exchanged by law enforcement agencies." *Id.* In this context of information sharing, the Privacy Act's requirements of accuracy and reliability of information are especially important.

B. The National Crime Information Center Is Exempt From Key Requirements

As we explained above, the National Crime Information Center ("NCIC") is a system that makes criminal history information widely available to police officers and law enforcement

officials across the United States. The Attorney General has the authority to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records" and "exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions." 28 U.S.C. § 534 (2002).

Furthermore, information can be entered into the system by either federal or state authorities. *Id.* A non-exhaustive list of information that Congress envisioned the NCIC to contain includes "arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence; and protection orders for the protection of persons from stalking or domestic violence, provided such orders are subject to periodic verification." *Id.*

The NCIC is an important and widely used database that is full of record inaccuracies. Yet, in 2003, the Department of Justice chose to exempt the NCIC from numerous mandates established by the Privacy Act, 5 U.S.C. § 552a, most notably accuracy requirements. As a result of this exemption, the FBI need not comply with 5 U.S.C. § 552a(e)(5), which requires an agency to "maintain all records which are used by the agency in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual[.]" 5 U.S.C. § 552a(e)(5). The NCIC is also exempt from 5 U.S.C. § 552a(e)(1), which requires that a system of records contain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency[.]" *Id.* at §552(e)(1).

C. The Automated Targeting System Is Exempt From Key Requirements

The Automated Targeting System creates secret, terrorist "risk assessments" of tens of millions of U.S. citizens and foreign visitors annually. Dep't of Homeland Sec., *Notice of Privacy Act System of Records: U.S. Customs and Border Protection, Automated Targeting System*, 72 Fed. Reg. 43,650 (Aug. 6, 2007). These "risk assessments" to determine whether individuals will be subject to invasive searches of their persons or belongings, and whether U.S. citizens will be permitted to enter or exit the country. *Id.* at 43,651. As the agency notice describing the system makes clear, the Automated Targeting System profiles may be integrated with other government databases and used for a wide variety of purposes.

In the System of Records Notice for the Automated Targeting System, the Department of Homeland Security sought exemptions from key Privacy Act requirements to ensure accurate and reliable data. *Id.* at 43,653. The agency sought these exemptions even though the Automated Targeting System uses data from erroneous government watch lists.

As explained above, the government watch lists have been deemed full of errors by several government agencies. In fact, the Justice Department's Inspector General said in 2007 that there was "indicate[d] a deficiency in the integrity of watchlist information." Justice Dept. Report on Watch Lists at xxii. Even with knowledge of these deficiencies, the Department of Homeland Security still sought to, and did in the end, exempt the Automated Targeting System from the accuracy requirements of the Privacy Act.

CONCLUSION

In her concurrence in *Arizona v. Evans*, Justice O'Connor wrote:

> In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.

514 U.S. 17-18.

Maintaining accurate record systems is one of the central requirements of information management. Moreover, the technology of government databases has changed dramatically since 1995, when the Court upheld the use of evidence obtained from an erroneous arrest record that was the product of a clerical mistake. It is no longer the case of one sheriff's clerk calling a clerk in another county. Today, the police have within their electronic reach access to an extraordinary range of databases. Mixed and mingled together are government and commercial databases filled with errors. Modern policing is a coordinated enterprise and it is critical that a commitment to accuracy is maintained throughout the criminal justice system.

Not only does erroneous data affect the rights of citizens, it also undermines effective investigations by creating confusion and mistakes. In recognition of the extraordinary consequences that may flow

from law enforcement officials acting upon such errors, the Court should enforce the exclusionary remedy in this case.

The need to safeguard privacy during a period of rapid technological change is self-evident.

> [W]e sense a great threat to privacy in modern America; we all believe that privacy is too often sacrificed to other values; we all believe that the threat to privacy is steadily and rapidly mounting; we all believe that action must be taken on many fronts now to preserve privacy.

SAMUEL ALITO, THE BOUNDARIES OF PRIVACY IN AMERICA 1 (1972) ("Report of the Chairman") (on file with *amici*).

Amici respectfully request this Court to grant Petitioner's motion to reverse the decision of the lower court.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

BENNIE DEAN HERRING,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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CASES

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California v. Willis,
46 P.3d 898 (2002) 21, 26

Dickerson v. United States,
530 U.S. 428 (2000) 4, 7

Elkins v. United States,
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Harlow v. Fitzgerald,
457 U.S. 800 (1982) 14

Hudson v. Michigan,
547 U.S. 586 (2006) ..... passim

Mapp v. Ohio,
367 U.S. 643 (1961) ..... passim

Missouri v. Seibert,
542 U.S. 600 (2004) 13, 16

Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978) 14

Nebraska v. Hisey,
723 N.W.2d 99 (Neb. Ct. App. 2006) 26

Nix v. Williams,
467 U.S. 431 (1984) 6

Pennsylvania Bd. of Prob. & Parole v. Scott,
527 U.S. 357 (1984) 5, 6

Segura v. United States,
468 U.S. 796 (1984) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Shadler v. State,
761 So. 2d 279 (2000) 25, 26

Silverthorne Lumber Co. v. United States,
251 U.S. 385 (1920) 4

Stone v. Powell,
428 U.S. 465 (1976) 6, 8

Terry v. Ohio,
392 U.S. 1 (1968) 9, 13

United States v. Calandra,
414 U.S. 338 (1974) 5, 9

United States v. Hensley,
469 U.S. 221 (1985) 27

United States v. Janis,
428 U.S. 433 (1976) 6, 12

United States v. Leon,
468 U.S. 897 (1984) ..... passim

Weeks v. United States,
232 U.S. 383 (1914) 3, 4, 13

Wolf v. Colorado,
338 U.S. 25 (1949) 4

Wong Sun v. United States,
371 U.S. 471 (1963) 5, 6

OTHER AUTHORITIES

Roger Amsden, *Police Cooperation Helps Nab Armed Robbery Suspects*,
Union Leader (Manchester, NH),
Oct. 1, 2004 23

Michael Avery, David Rudovsky & Karen Blum, Police Misconduct (3d ed. 2007) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Ben Benton, *Police Cooperation Pays Off*, Chattanooga Times Free Press, Dec. 14 2006 23

Donald Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. Mich. J.L. Ref. 591 (1990) 16

William A. Geller & Norval Morris, *Relations between Federal and Local Police*, 15 Crime & Just. 231-348 (1992) 23

Herman Goldstein, *Confronting the Complexity of the Policing Function in* Discretion in Criminal Justice: The Tension Between Individualization and Uniformity (Lloyd E. Ohlin & Frank J. Remington, eds. 1993) 25

Petter Gottschalk, *Stages of Knowledge Management Systems in Police Investigations*, 19 Knowledge-Based Sys. 381-87 (2006) 22

Int'l Ass'n of Chiefs of Police, Criminal Intelligence Sharing: A National Plan for Intelligence-led Policing at the Local, State and Federal Levels (2002) 22

Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a Principled Basis Rather than an Empirical Proposition*, 16 Creighton L. Rev. 565 (1983) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

1 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2d. ed. 2003) 19, 28, 29

Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000) 15

Saul Levmore & William J. Stuntz, *Remedies and Incentives in Public and Private Law: A Comparative Essay*, 1990 Wis. L. Rev. 483 (1990) 15

Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24 (1980) 11

Tan Woei Luen, *Knowledge Management in the Public Sector: Principles and Practices in Police Work*, 27 J. Info. Sci. 311-318 (2001) 22

Heather Morton, Integrated Criminal Justice Information Systems, National Conference of State Legislatures (2001) 24

Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 Tex. L. Rev. 939 (1966) 10

Office of Justice Programs, Justice Information Sharing Initiatives: A White Paper (2004) 22

TABLE OF AUTHORITIES
(continued)

Page(s)

Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision Makers*, *in* Discretion in Criminal Justice: The Tension Between Individualization and Uniformity (Lloyd E. Ohlin & Frank J. Remington, eds. 1993) 25

Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75 (1992) 11

Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753 (1993) 16

L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669 (1998) 9

Police Cooperation in Region Leads to Solving Robberies, Conn. Post (Bridgeport), Oct. 7, 2007 23

A. Kenneth Pye, *Charles Fahy and the Criminal Law*, 54 Geo. L.J. 1055 (1966) 17

Michael Redmond & Alok Baveja, *A Data-driven Software Tool for Enabling Cooperative Information Sharing Among Police Departments*, 141 Eur. J. Operational Res. 660-678 (2002) 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Aki Roberts & John M. Roberts Jr., *The Structure of Informal Communication Between Police Agencies*, 30 Policing: Int'l J. Police Strategies & Mgmt. 93-107 (2007) 25

Malcolm Russell-Einhorn, et al., Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999, National Institute of Justice, NCJ 201782 (2000) 23

Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, Crim. Just. Ethics, Summer/Fall 1982 10

David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 Ohio St. J. Crim. L. 567 (2008) 12, 16, 17

Arlen Specter, Mapp v. Ohio: *Pandora's Problems for the Prosecutor*, 111 U. Pa. L. Rev. 4 (1962) 10

Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820 (1994) 9

Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365 (1983) 12, 13

Roger Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 Duke. L.J. 319 (1962) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Samuel Walker, Op-Ed, L.A. Times, June 25, 2006 16

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INTEREST OF THE AMICUS CURIAE[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

For nearly a century, and in dozens of cases, this Court has insisted that the exclusionary rule is an essential remedy for Fourth Amendment violations. The rule encourages compliance with the Fourth Amendment in the most effective way—by removing the incentive for police to disregard it.

Accordingly, while the Court has excepted from the exclusionary rule certain violations arising from errors made by non-law-enforcement personnel, *see United States v. Leon*, 468 U.S. 897 (1984), it has never applied that rule when it is the police themselves who are at fault. Nor should it here. As is conceded in this case, the error underlying Herring's unconstitutional arrest is attributable to an "adjunct to law enforcement"—for purposes of the exclusionary rule, a police officer. Pet. App. 8a. Under those circumstances, as the Court's precedent indicates and empirical research confirms, the exclusionary rule operates precisely as intended, as an effective deterrent to future *police* misconduct.

Nor should the Court accept the invitation of the United States to carve out a new exclusionary rule exception for collaborative police conduct that occurs across jurisdictional lines. Whether they work alone, with partners in their own departments, or with fellow officers from other departments, police officers remain members of "the law enforcement team," *Leon*, 468 U.S. at 917, fully subject to the deterrent effects of the exclusionary rule. Today's law enforcement operates collectively, and it can be deterred collectively, as well. To hold otherwise would badly undermine the deterrent effect of the exclusionary rule, giving officers new and perverse incen-

tives to engage in unlawful cross-departmental conduct without fear of the exclusionary sanction.

I. THE EXCLUSIONARY RULE REMAINS A NECESSARY REMEDY FOR FOURTH AMENDMENT VIOLATIONS.

A. For Nearly A Century, This Court Has Required Exclusion Of Unconstitutionally Seized Evidence.

In dozens of cases over the past 100 years, this Court has reaffirmed that the exclusionary rule is a necessary remedy for Fourth Amendment violations. The Court has limited application of the exclusionary rule in some circumstances, and created certain categorical exceptions to the rule, but it has never questioned the essential role of the exclusionary rule in effectuating the protections of the Fourth Amendment. *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

1. Application of the exclusionary rule in federal proceedings—like the one at issue in this case—has been a matter of settled law for almost a century. In *Weeks v. United States*, 232 U.S. 383 (1914), this Court applied the exclusionary rule to prohibit the introduction in a federal proceeding of evidence seized in violation of the Fourth Amendment. The Court tied the exclusionary rule directly to the substantive protections of the Fourth Amendment, reasoning that "[i]f [evidence] can thus be [unlawfully] seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value,

and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.* at 393; *see also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.) (applying exclusionary rule in federal proceeding because without the rule, "the Fourth Amendment [is reduced] to a form of words").

It was only with respect to state proceedings that the exclusionary rule issue remained unsettled after the earliest part of the 20th century. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court initially declined to extend the exclusionary rule to state criminal proceedings. But in 1961, in *Mapp v. Ohio*, 367 U.S. 643, the Court finally resolved the issue, overruling *Wolf* and holding that the exclusionary rule is enforceable against the states as an intrinsic part of the Fourth Amendment itself. As in the federal context, the Court reasoned that the exclusionary rule was necessary to give practical meaning to the Fourth Amendment's substantive provisions. Quoting Justice Holmes's opinion in *Silverthorne*, the *Mapp* Court described the exclusionary rule as a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'" *Mapp*, 367 U.S. at 648.

Since *Mapp*, the Court has consistently applied the exclusionary rule against the states, reaffirming the exclusionary rule's essential role in enforcing underlying Fourth Amendment rights. *Cf. Dickerson v. United States*, 530 U.S. 428, 438 (2000) (constitutional status of *Miranda* rule confirmed by continued application of rule against the states). It has extended the exclusionary rule beyond evidence

obtained directly as a result of an unconstitutional search or seizure to reach evidence only indirectly derived from a Fourth Amendment violation. *See Segura v. United States*, 468 U.S. 796, 804 (1984) ("[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'") (internal citation omitted)); *Wong Sun v. United States*, 371 U.S. 471 (1963). And the Court has never questioned the continued validity of the proposition that "the exclusionary rule . . . generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights." *See Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 359 (1998).

2. More recent of the Court's cases have built on the early reasoning of *Weeks* and *Mapp* to make clear that the exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Leon*, 468 U.S. at 906 (internal quotation omitted); *see also United States v. Calandra*, 414 U.S. 338, 347 (1974) ("prime purpose" of exclusionary rule is to "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures"). Accordingly, the Court has limited application of the exclusionary rule where it believes the "rule can be modified somewhat without jeopardizing its ability to perform its intended [deterrent] functions." *Leon*, 468 U.S. at 905.

Most pertinent here, the Court has concluded that where a police officer reasonably relies on a search warrant made defective by a magistrate's

mistake, or an arrest warrant proffered in error by a court employee, application of the exclusionary rule would have no cognizable deterrent effect and is thus unjustified. *Leon*, 468 U.S. at 906-07 (weighing deterrent benefits against costs of exclusion when officer relies on defective warrant); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (applying *Leon* to error by court clerk). Similarly, the Court has held the exclusionary rule inapplicable where evidence is obtained through means independent of police misconduct, or would inevitably have been discovered even absent police misconduct, on the theory that the exclusionary sanction is not necessary for deterrence in such cases. *See Wong Sun*, 371 U.S. 471 (independent source); *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery).[2]

Most recently, the Court held in *Hudson v. Michigan*, 547 U.S. 586 (2006), that the exclusionary rule generally does not apply to violations of the constitutional "knock-and-announce" requirement. The Court reasoned that the interests protected by the knock-and-announce rule do not include the privacy interests normally implicated by an unlawful search. 547 U.S. at 593-94. Accordingly, a no-knock search is not the "unattenuated caus[e]" of any privacy intrusion that occurs when the police find and seize evidence. *Id.* at 594; *see also id.* at 592 (ques-

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[2] On similar reasoning, the Court has declined to apply the exclusionary rule to certain categories of proceedings, holding that the exclusionary rule's deterrent function is fully served by application of the rule in core criminal proceedings. *See, e.g., Pa. Bd. of Prob. & Parole*, 524 U.S. 357 (exclusionary rule inapplicable in parole revocation proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (civil tax proceedings); *Stone v. Powell*, 428 U.S. 465 (1976) (habeas proceedings).

tioning whether no-knock search is "but-for" cause of obtaining evidence). In that sense, *Hudson* does not create an "exception" to the exclusionary rule at all, but simply applies the well-established proposition that evidence need not be excluded if its discovery is not the direct and "unattenuated" result of unlawful police conduct.

These post-*Mapp* cases have limited the scope of the exclusionary rule. But what is important here is that none has called into question the continued vitality of the exclusionary rule or the rule's application in cases of unlawful police behavior tied directly to the recovery of incriminating evidence. *See Hudson*, 547 U.S. at 612-13 (Breyer, J., dissenting). As with the *Miranda* rule, "[i]f anything, [the Court's] subsequent cases have reduced the impact of the . . . [exclusionary] rule on legitimate law enforcement while reaffirming the . . . core" of the rule. *Dickerson*, 530 U.S. at 443.

3. Although some members of this Court have raised questions regarding the continued vitality of the exclusionary rule, *see Hudson*, 547 U.S. at 594-99, the exclusionary rule, like the *Miranda* rule, "has become embedded in routine police practice to the point where [it] ha[s] become part of our national culture," *Dickerson*, 530 U.S. at 443 (declining to overrule *Miranda*); *Hudson*, 547 U.S. at 613 (Breyer, J., dissenting) ("The Court has decided more than 300 Fourth Amendment cases since *Weeks*," finding violations "in nearly a third of them," and "either explicitly or implicitly upheld (or required) the suppression of evidence at trial" in all but those subject to certain categorical exceptions). There is no "special justification" for transgressing the principle of *stare decisis*, *see Dickerson*, 530 U.S.

at 443, and overruling the *Weeks* rule, firmly established since 1914. On the contrary, the exclusionary rule is a settled part of law-enforcement practice and a crucial guarantor of Fourth Amendment rights. *See Hudson*, 547 U.S. at 603 (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

B. The Exclusionary Rule Effectuates The Fourth Amendment's Guarantees By Deterring Violations.

The exclusionary rule deters police misconduct in a straightforward and effective way: it reduces the value of evidence obtained as a result of Fourth Amendment violations, and thus eliminates what otherwise would be a powerful incentive for police to engage in such violations. Or, as the Court explained in *Stone v. Powell*, "the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." 428 U.S. at 492.

Contrary to the assumption of the court below, *see* Pet. App. 10a, the exclusionary rule works to deter negligent as well as intentional illegality. So long as the exclusionary rule applies, the police have no incentive to engage in willful Fourth Amendment violations to build a case for trial—and every incentive to invest the resources necessary to avoid negligent violations that might undermine prosecutions. *Cf. Alderman v. United States*, 394 U.S. 165, 175-76 (1969) (exclusionary rule applies to "unlawful wiretapping or eavesdropping, whether deliberate or negligent").

Empirical research confirms what logic and precedent indicate: The exclusionary rule continues to effectuate its "prime purpose" of "deter[ring] future unlawful police conduct and thereby effectuat[ing] the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Calandra*, 414 U.S. at 347.[3]

1. Perhaps the most striking evidence of the exclusionary rule's effectiveness is the change identified by *Hudson*, 547 U.S. at 598-99: the wave of improvements in police training that followed the Court's application of the exclusionary rule to the states in *Mapp*. Indeed, even scholars hostile to the exclusionary rule have recognized this effect. *See, e.g.*, L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669, 710-11 (1998) ("*Mapp* has probably made officers more aware of the Fourth Amendment, and

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[3] While the exclusionary rule is an essential tool for deterring unconstitutional law-enforcement conduct, it also serves other important ends. *See* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a Principled Basis Rather than an Empirical Proposition*, 16 Creighton L. Rev. 565, 598-606 (1983) (discussing non-deterrence rationales for exclusionary rule). Indeed, before narrowing its focus to the deterrence rationale, the Court itself recognized that the exclusionary rule furthers the "imperative of judicial integrity" by ensuring that the courts do not ratify unconstitutional searches and seizures by admitting the evidence that results. *Elkins v. United States*, 364 U.S. 206, 222 (1960); *see also Terry v. Ohio*, 392 U.S. 1, 13 (1968) ("Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."). The exclusionary rule also serves a critical law-development function, ensuring that questionable searches and seizures are presented to judges during the course of criminal trials, so that courts can continue to formulate a comprehensive body of Fourth Amendment doctrine. *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 851-52 (1994).

has increased the number of warrants they obtain . . . . ").

Some of the most striking evidence of *Mapp*'s effect on police training comes from first-hand accounts of law-enforcement personnel. Michael Murphy, New York City's police commissioner at the time of *Mapp*, recounted that the decision had a "dramatic and traumatic effect" on the police. Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 Tex. L. Rev. 939, 941 (1966). In the wake of the decision, Commissioner Murphy immediately undertook a reevaluation of existing training procedures, developed new policies, and held retraining sessions. And he observed a sharp uptick in the use of search warrants in response to the reinforced stringency of the Fourth Amendment that came with *Mapp*. *Id.* at 941-42.

Similarly, then-Philadelphia District Attorney Arlen Specter described *Mapp* as "the most significant event in criminal law since the adoption of the fourteenth amendment," and said that it "revolutionized" the practices of police and prosecutors. Arlen Specter, Mapp v. Ohio: *Pandora's Problems for the Prosecutor*, 111 U. Pa. L. Rev. 4, 4 (1962). Other prosecutors have likewise attested to the ongoing deterrent benefits of the rule. *See, e.g.*, Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, Crim. Just. Ethics, Summer/Fall 1982, at 28-30 ("I have watched the rule deter, routinely, throughout my years as a prosecutor.").

2. Empirical studies confirm the exclusionary rule's deterrent effects. After undertaking a thorough investigation of the New York City Police De-

partment, for instance, Professor Milton Loewenthal concluded that the exclusionary rule "support[s] the credibility of the courts and the law in the mind of the police officer," and overall, "acts as a significant, albeit reasonable, deterrent to illegal police searches" that officers accept as a "necessary fact of life." Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24, 38-39 (1980).

Professor Myron Orfield's study of Chicago police officers reached a similar result, finding that the rule had "significant deterrent effects" on both an individual and an institutional level. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 79-80 (1992). Orfield documented individual police officers' awareness of, and reaction to, the exclusionary rule, and found that officers indicated that they "experience[d] adverse personal reactions" when the suppression of illegally obtained evidence interfered with a conviction. *Id.* at 80. At the institutional level, Orfield found that police supervisors and prosecutors responded to the rule by developing new compliance programs. *Id.* The combined effect, Orfield concluded, was that while police perjury remains a problem, "because of the exclusionary rule, [the police] often obey the Fourth Amendment. By any measure, this is an improvement" over the pre-*Mapp* regime. *Id.* at 132.

3. This empirical evidence of the exclusionary rule's efficacy is particularly striking given the difficulty of "proving a negative"—that an illegal search or seizure that has *not* been conducted would have been conducted but for the exclusionary rule. As

the Court has recognized, it is "hardly likely that conclusive factual data could ever be assembled" on the issue. *Elkins*, 364 U.S. at 218; *see also* Pet. App. 7a ("empirical evidence of the rule's deterrent effect is difficult, if not impossible, to come by"). In this post-*Mapp* world, "all possibility of broad-scale controlled or even semi-controlled comparison studies has been eliminated." *Janis*, 428 U.S. at 451-52.

That said, it is possible to learn from the police response when the threat of exclusion is lifted in a particular class of cases. For example, after this Court held that only defendants whose own personal rights had been violated could invoke the exclusionary remedy, *see Alderman*, 394 U.S. 165, the government expressly encouraged law-enforcement agents to "purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence [that could be introduced] against third parties." Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1403 n.201 (1983) (*citing United States v. Payner*, 447 U.S. 727, 730 (1980)). Similarly, after a 1982 California ballot initiative permitted the admission of evidence seized in violation of the state (but not the federal) constitution, California police academy materials and legal sourcebooks affirmatively encouraged officers to ignore the state constitutional prohibition on certain searches. *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 Ohio St. J. Crim. L. 567, 580-81 (2008).

This Court, of course, is familiar with the ways in which limits on the exclusionary rule may translate into official police policy designed to circumvent

constitutional rules. *See, e.g., Missouri v. Seibert*, 542 U.S. 600, 609-10 (2004) (discussing local and national police-training materials advocating the withholding of *Miranda* warnings before first confession because second confession may be admitted into evidence). Such cases confirm the wisdom of the Court's original insight that the substantive guarantees of the Fourth Amendment are inextricably linked to the exclusionary rule. *See, e.g., Weeks*, 232 U.S. at 393. In the absence of an exclusionary sanction, police officers may come to believe—or be trained to believe—that substantive Fourth Amendment rules need not be obeyed. If unconstitutionally seized evidence can be used to secure confessions, then it becomes all too easy for police officers to go from asking themselves, "what does the Fourth Amendment require?" to asking, "what will the courts allow me to get away with?" Stewart, *supra*, at 1403; *see also Terry*, 392 U.S. at 13 ("admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence").

C. Alternative Remedies For Fourth Amendment Violations Are Inadequate.

Despite the theoretical availability of certain alternative remedies, the exclusionary rule remains what it was in 1961, when *Mapp* was decided: a necessary remedy, without which the Fourth Amendment would become "an empty promise." *Mapp*, 367 U.S. at 660.

In *Mapp*, this Court surveyed the legal landscape in non-exclusionary rule states, and correctly concluded that Fourth Amendment remedies other

than the exclusionary rule had proven "worthless and futile." 367 U.S. at 652. The exclusionary rule, the Court recognized, "compel[s] respect for the constitutional guaranty in the *only effectively available way*—by removing the incentive to disregard it." *Elkins*, 364 U.S. at 217 (emphasis added); *see also* Roger Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 Duke. L.J. 319, 321-22 (1962) ("It became impossible to ignore . . . that illegal searches and seizures [pre-*Mapp*] were also a routine procedure subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity?").

The Court suggested in *Hudson* that civil remedies, expanded since the time of *Mapp*, might now suffice to deter Fourth Amendment violations. *Hudson*, 547 U.S. at 598. That assessment is overly optimistic. Civil remedies may have improved over time, but they remain inadequate to the task of effective deterrence. Qualified immunity defenses bar recovery against officers unless it can be shown that they violated "clearly established" law, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and municipalities cannot be held liable unless a constitutional violation results from official policy or custom, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *see also* Amicus Br. of ACLU. Indeed, the same experts cited by the Court in *Hudson*, *see* 547 U.S. at 597-98, conclude that recent doctrinal developments in civil rights damages actions only confirm that "the exclusionary rule is essential to deter police misconduct in search and seizure cases." Michael Avery, David Rudovsky & Karen Blum, Police Misconduct § 2:24 n.20 (3d ed. 2007).

As a practical matter, potential plaintiffs, many of whom will not appear terribly sympathetic to juries, lack both incentives and resources to litigate civil rights claims. They face uncertain and limited damages, and even when they prevail, may find it difficult to collect from individual officers. *See* Saul Levmore & William J. Stuntz, *Remedies and Incentives in Public and Private Law: A Comparative Essay*, 1990 Wis. L. Rev. 483, 490-91 (1990). And damages remedies, unlike the exclusionary rule, do not act directly on the political incentives most important to police officers. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 417 (2000). In short, there is no reason to believe that civil remedies can substitute for the exclusionary rule in terms of deterrence. *See Hudson*, 547 U.S. at 610-11 (Breyer, J., dissenting).

Nor is there reason to believe that "the increasing professionalism of police forces, including a new emphasis on internal police discipline," *Hudson*, 547 U.S. at 598, can fill that role. Simply as a matter of logic, that suggestion from *Hudson* makes no sense: The "increasing professionalism of police forces" is a direct *result* of application of the exclusionary rule, *see supra* at 8-13, and it cannot simply be assumed that improvements brought about by the exclusionary rule will survive if the rule itself is abandoned. In any event, research indicates that positive police professionalism requires active judicial oversight, including the exclusionary sanction. As found by criminologist Samuel Walker, on whose research *Hudson* relied, *see* 547 U.S. at 599, "the results [of studies] reinforce the Supreme Court's continuing importance in defining constitutional pro-

tections for individual rights and requiring the appropriate remedies for violations, *including the exclusion of evidence.*" Samuel Walker, Op-Ed, L.A. Times, June 25, 2006, at M5 (emphasis added). And police professionalism is only as good as the content of professional norms: Police officers can be trained to respect constitutional rules, but they also can be trained to circumvent them. *See, e.g.*, *Seibert*, 542 U.S. at 609-11 & nn. 2-3 (describing professional training materials encouraging interrogation practices that would evade *Miranda*'s protections). The exclusionary rule remains necessary to shape the professionalism of the police.

Finally, there are no grounds for concluding that the "internal police discipline" referred to in *Hudson* can render the exclusionary rule unnecessary. The literature makes clear that internal discipline procedures are too rarely invoked and too often ineffective to have a systemic deterrent effect. *See, e.g.*, Donald Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. Mich. J.L. Ref. 591, 629 (1990) (infrequency of federal internal disciplinary investigations for Fourth Amendment violations); Sklansky, *supra*, at 572-74 (inefficacy of citizen review panels); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753, 787-94 (1993) (inadequacy of internal affairs procedures).

That is not to say, of course, that civil remedies and internal discipline have no role to play in effectuating the guarantees of the Fourth Amendment. "No proponent of the exclusionary rule has suggested that it should act in isolation," A. Kenneth

Pye, *Charles Fahy and the Criminal Law*, 54 Geo. L.J. 1055, 1072 (1966), and alternative approaches to deterrence can and should continue to supplement the exclusionary rule. But the exclusionary rule, even if "by itself inadequate," remains "irreplaceable" as a means of deterring unlawful police behavior. Sklansky, *supra*, at 582; *see also Hudson*, 547 U.S. at 603 (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

II. EVIDENCE UNCONSTITUTIONALLY SEIZED BECAUSE OF POLICE ERROR MUST BE EXCLUDED.

A. The Exclusionary Rule Has Always Applied To Errors Committed By The Law Enforcement Team.

1. The point of the exclusionary rule, the Court held in *Leon*, is to "deter *police* misconduct," rather than to "punish the errors of judges and magistrates" or other non-law-enforcement personnel. 468 U.S. at 916 (emphasis added). Accordingly, exclusionary rule jurisprudence draws a clear and firm line between members of the law-enforcement team, whose errors are subject to deterrence by way of the exclusionary rule, and others involved in the criminal justice system, such as magistrates and court clerks, whose errors fall outside the scope of the exclusionary rule.

The Court explained this crucial distinction in *Leon*. The exclusionary rule, it reasoned, was historically directed at police officers, and not at those who are neither law-enforcement officers nor "adjuncts to the law-enforcement team." 468 U.S. at

916-17. The Court justified that singular focus on functional grounds: Because the exclusionary rule deters by threatening the suppression of evidence at a criminal trial, it "cannot be expected significantly to deter" those who are not "adjuncts to the law-enforcement team" and thus "have no stake in the outcome of particular criminal prosecutions." *Id.* at 917. Thus, the Court held in *Leon* that the exclusionary rule could not deter, and thus would not apply to, a search rendered unlawful by the error of a magistrate in issuing a search warrant.

The Court applied precisely the same reasoning in *Arizona v. Evans*, in which an unlawful arrest was predicated on a clerical error by a court employee who failed to inform the arresting officer that an outstanding warrant had been quashed. Again, the Court emphasized that "the exclusionary rule was historically designed as a means of deterring *police* misconduct" only. 514 U.S. at 14 (emphasis added). And again, the Court concluded that "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime," they have no stake in the outcome of criminal prosecutions and thus cannot be deterred by the suppression of evidence. *Id.* at 15 (internal citation omitted).

2. This case falls squarely on the other side of the line drawn by cases like *Leon* and *Evans*. In this case, the error underlying the unlawful arrest of Herring originated not with a magistrate or a court clerk, but with another law-enforcement agent: a warrant clerk employed by a county sheriff's department, concededly a member or "adjunct" of the "law-enforcement team" who, as the court be-

low recognized, "is to be treated for purposes of the exclusionary rule as a police officer." Pet. App. 8a.

Under the well-established principles laid out in *Leon* and *Evans*, it follows that the exclusionary rule must apply in this case. The original error in question here—the provision of incorrect information about an outstanding arrest warrant—was committed by a functional police officer, precisely the actor at whom the exclusionary rule was traditionally and is today directed. *See Leon*, 468 U.S. at 916; *Evans*, 514 U.S. at 14. And because the warrant clerk is part of the "law-enforcement team," she is as invested in the outcome of criminal prosecutions as any other police officer, and thus fully subject to the deterrent effects of the exclusionary rule. *See Leon*, 468 U.S. at 917; *Evans*, 514 U.S. at 14.

Adhering to the *Leon/Evans* line between the "law-enforcement team," on the one hand, and non-law-enforcement personnel, on the other, is critical to the deterrence of police misconduct. Withdrawal of the exclusionary sanction as to the mistakes of law-enforcement agents restores to those agents—the very persons "engaged in the often competitive enterprise of ferreting out crime," *Evans*, 514 U.S. at 15—a significant incentive to engage in improper conduct, or, at the very least, to refrain from expending the time and resources necessary to avoid negligent mistakes. As explained by leading scholar Wayne LaFave, when an underlying error is committed by police personnel, then "the police agency itself is in a position to remedy the situation and might well do so"—but only "if the exclusionary rule is there to remove the incentive to do otherwise." 1 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 18(e)(4), at 313 (2d. ed.

2003). In *Leon* terms, this is not a "context" in which "the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended [deterrence] functions." 468 U.S. at 905.

B. The Exclusionary Rule Applies To Cross-Jurisdictional Law-Enforcement Collaborations.

In finding the exclusionary rule inapplicable, the court below relied in part on the fact that law-enforcement agents from two different counties were involved in Herring's unlawful arrest: The warrant clerk who provided the erroneous information was an employee of the sheriff's office in Dale County, Alabama, while the arresting officer was employed by the sheriff's office in neighboring Coffee County. Pet. App. 9a; *see also id.* at 11a-12a. The United States defends the ruling below on similar grounds, arguing that excluding evidence from a prosecution in one county will not significantly deter police misconduct in another. Opp. Cert. 11. In fact, the cross-jurisdictional nature of the police action in this case is wholly irrelevant to application of the exclusionary rule.

1. Under *Leon* and *Evans*, what matters for exclusionary rule purposes is the law-enforcement nature of the personnel responsible for an unlawful search or seizure, not the location of their offices. Dale County's warrant clerk and Coffee County's arresting officer were functioning as members of precisely the same "law-enforcement team," *Leon*, 468 U.S. at 917: an inter-county team working together to bring about Herring's arrest. Indeed, when Dale County's warrant clerk provided information to Coffee County law enforcement, she be-

came just as much an "adjunct[] to the law-enforcement team," *id.*, of *Coffee County* as of Dale County. There is no reason to believe that all members of that law-enforcement team did not share the same interest in the successful outcome of their collective enterprise, meaning that all would be fully subject to the deterrent effects of the exclusionary sanction under *Leon* and *Evans*.

2. This case is not unique. Law enforcement is—for good reason—often a collective enterprise, and that collective enterprise is subject to collective deterrence. Given the collaborative nature of contemporary law enforcement, application of the exclusionary rule serves as a necessary systemic deterrent, influencing actors in departments and agencies throughout the criminal justice community.

2a. As patterns of crime increasingly transcend jurisdictional lines, successful law enforcement has come to depend upon information sharing and operational collaboration among officials at the local, state, and federal levels.

As in this case, law enforcement officers commonly rely on computerized databases operated by different departments or agencies.[4] "In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possi-

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[4] *See, e.g.*, *California v. Willis*, 46 P.3d 898, 900 (2002) (in the course of investigating the defendant, police officer checked three sources—the "department records," "the local criminal justice information system," and "the parole listing"—each of which were managed by a different agency).

ble. The police, of course, are entitled to enjoy the substantial advantages this technology confers." *Evans*, 514 U.S. at 17-18 (O'Connor, J., concurring).

In the aftermath of September 11, 2001, formal initiatives to enhance inter-agency communication and cooperation expanded rapidly, *see* Office of Justice Programs, Justice Information Sharing Initiatives: A White Paper (2004) (documenting information-sharing and integration programs), and one result has been a notable increase in information-sharing systems that aid in cross-jurisdictional police investigations and prosecutions. *See, e.g.*, Petter Gottschalk, *Stages of Knowledge Management Systems in Police Investigations*, 19 Knowledge-Based Sys. 381-87 (2006) (identifying various applications of knowledge management systems to police investigations and law-enforcement operations); Tan Woei Luen, *Knowledge Management in the Public Sector: Principles and Practices in Police Work*, 27 J. Info. Sci. 311-318 (2001) (discussing information management principles and practices in police work).

Information-sharing and other forms of cooperation exist both horizontally across local law-enforcement agencies and vertically among local, state, and federal actors. Police departments across the country now share information about a wide range of policing issues. *See, e.g.*, Int'l Ass'n of Chiefs of Police, Criminal Intelligence Sharing: A National Plan for Intelligence-led Policing at the Local, State and Federal Levels (2002). And federal, state and local law-enforcement agencies coordinate enforcement efforts and general operations, as well as information exchanges. *See, e.g.*, Malcolm Russell-Einhorn et al., Federal-Local Law Enforce-

ment Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999, National Institute of Justice, NCJ 201782 (2000) (detailing operational collaboration and enforcement coordination among federal, state, and local agencies); Alexander Weiss, Informal Information Sharing Among Police Agencies, National Institute of Justice (1998) (identifying widespread information-sharing among law-enforcement officials and professional organizations as well as through an informal network of police agencies); William A. Geller & Norval Morris, *Relations between Federal and Local Police*, 15 Crime & Just. 231-348 (1992) (highlighting extensive local and federal cooperation through information exchange, technical assistance, and multi-jurisdictional operational task forces).

Cooperation between police departments in neighboring jurisdictions—as in this case—is especially prevalent, and often seen as essential to effective law-enforcement. Reports of successful cooperation between nearby police departments fill the pages of local newspapers.[5] Many states have developed integrated criminal justice information sys-

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[5] *See, e.g.*, Ben Benton, *Police Cooperation Pays Off*, Chattanooga Times Free Press, Dec. 14 2006, at B2 (county sheriff credited "free flow of information and cooperative effort" between officers in neighboring departments with successful arrest and prosecution); Roger Amsden, *Police Cooperation Helps Nab Armed Robbery Suspects*, Union Leader (Manchester, NH), Oct. 1, 2004, at A8 (police chief identified "good police work with officers from different agencies" sharing information as key to arrest); *Police Cooperation in Region Leads to Solving Robberies*, Conn. Post (Bridgeport), Oct. 7, 2007 (commending local police departments for "sharing information and working collaboratively" to make arrests and fight crime).

tems to aid collaborative law enforcement efforts between local departments. *See, e.g.*, Heather Morton, Integrated Criminal Justice Information Systems, National Conference of State Legislatures (2001), *available at* http://www.ncsl.org/programs/lis/intjust/report01.htm (highlighting the experiences of three states in developing extensive data systems to share policing information across jurisdictions). Police now utilize socioeconomic, crime, and enforcement profiles of various locales to identify communities that are the best candidates for enhanced police cooperation and information sharing. *See* Michael Redmond & Alok Baveja, *A Data-driven Software Tool for Enabling Cooperative Information Sharing Among Police Departments*, 141 Eur. J. Operational Res. 660-678 (2002).

This cooperation across departments and jurisdictions is a necessary part of contemporary law enforcement. Crime does not respect jurisdictional boundaries, and crime prevention should not be unduly limited by those boundaries, either. Interdepartment cooperation is commonplace and in many ways desirable, but carries with it a "corresponding constitutional responsibilit[y]," *Evans*, 514 U.S. at 17-18 (O'Connor, J., concurring), to collectively respect the Fourth Amendment. That duty can be effectuated only by application of the exclusionary rule to the entire law-enforcement team, including members from cooperating departments.

2b. In large part because they operate collectively, law-enforcement officials can be deterred collectively as well. Social-science research confirms what precedent and common sense would suggest: Officers who work together collaboratively, even across jurisdictional lines, become invested in the

common enterprise and are influenced by events that occur in agencies other than their own.

Formal initiatives designed to enhance law-enforcement cooperation have permeated law-enforcement culture. *See, e.g.*, Aki Roberts & John M. Roberts Jr., *The Structure of Informal Communication Between Police Agencies*, 30 Policing: Int'l J. Police Strategies & Mgmt. 93-107 (2007) (discussing various forms of communication between police agencies). In part because they work so closely together, the "various parts of the [criminal justice] system [are] so interdependent, the resources allocated in such a fashion that attempts to change any one part, to control any one decision point, affect[s] the others." Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision Makers*, *in* Discretion in Criminal Justice: The Tension Between Individualization and Uniformity 7-8 (Lloyd E. Ohlin & Frank J. Remington, eds. 1993) ("Ohlin & Remington"). It is therefore "imperative to view all operations by [law-enforcement] agencies as part of an intricate . . . system" with interdependent parts, always cognizant of the "effect that decision making at one point in the system has on operations at another point." Herman Goldstein, *Confronting the Complexity of the Policing Function*, in Ohlin & Remington, 37-38, 58-59.

It is not surprising, then, that many courts have concluded that because law enforcement operates collectively, it also will respond collectively to the incentives of the exclusionary rule. In *Shadler v. State*, 761 So. 2d 279 (2000), for instance, the Florida Supreme Court applied the exclusionary rule to evidence illegally obtained by a police officer as a result of an error by the Department of Highway

Safety. Relying on the integrated nature of state law-enforcement efforts, the court held that the exclusionary sanction would affect the behavior of the Department despite the fact that it would not directly "bear the brunt," Opp. Cert. at 11, of suppression:

> [W]e conclude that the exclusion of evidence . . . will surely serve to encourage accurate record-keeping of driver's license information . . . . Because the Department of Highway Safety is responsible for the related law enforcement functions of agency record-keeping and monitoring traffic offenses and crime on the state's highways, there is an institutional obligation as well as a direct mechanism for feedback from fellow employees to communicate the effect of the exclusionary rule.

Shadler, 761 So. 2d at 285-86. Similarly, the Supreme Court of California explained in *Willis* that because parole officers "often work hand in hand with the police" and act "with a unity of purpose" in the investigation of crime, "the threat of exclusion can be expected to alter [their] behavior." 46 P.3d at 908-09; *see also id.* at 912-13 (applying same reasoning to Department of Corrections data-entry clerks); *Nebraska v. Hisey*, 723 N.W.2d 99, 110 (Neb. Ct. App. 2006) (because state Department of Motor Vehicles is "closely related to law enforcement . . . and is integral to enforcement of the laws concerning motor vehicles . . . . [w]e find that the threat of exclusion of evidence will likely encourage DMV employees charged with recording and trans-

mitting information on license impoundments to exercise greater caution").

3. This Court has never suggested that cooperating law-enforcement personnel employed by different departments can avoid application of the exclusionary rule simply by dividing responsibilities between themselves. Indeed, the Court has indicated just the opposite: that cooperating law-enforcement personnel are to be treated as a single collective whole for Fourth Amendment purposes. *See, e.g., United States v. Hensley*, 469 U.S. 221, 231 (1985) (imputing knowledge justifying a seizure held by any one officer or department to all other law-enforcement personnel working on the same investigation).

Nor has the Court hesitated to apply the exclusionary rule to collaborating actors and agencies working together in a law-enforcement capacity. The exclusionary rule should apply to collaborating law-enforcement agents from neighboring counties just as it does to evidence gathered by police officers and later used by prosecutors, *Mapp*, 367 U.S. 643 (excluding evidence illegally obtained by state law-enforcement officials); evidence gathered by an officer executing a warrant obtained by a different officer, *see Leon*, 468 U.S. at 918 n.24 (lack of objective reasonableness by any involved officer, including officer executing warrant sought by colleague, will lead to suppression); and, before *Mapp* extended the exclusionary rule to the states, to evidence gathered by state officials that federal prosecutors sought to introduce in federal proceedings, *see Elkins*, 364 U.S. at 208.

The contrary rule proposed by the court of appeals and the United States would effectively except from exclusion evidence unconstitutionally seized as a result of police error or misconduct, so long as the search or seizure itself is executed by a collaborating officer from another jurisdiction. But there is no reason why the exclusionary rule should not apply to a law-enforcement collaboration simply because an error originates in one jurisdiction and bears fruit in another. Pegging application of the exclusionary rule to jurisdictional boundaries would only create an artificial boundary within what is functionally a single law-enforcement team. *See supra* at 20-21 (applying *Leon* and *Evans*).

Moreover, any such limitation on the exclusionary rule would create significant and perverse incentives for police officers to engage in "working arrangements" that would allow circumvention of Fourth Amendment protections. *See Mapp*, 367 U.S. at 658 ("Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted."). An officer who knows that his own jurisdiction's arrest-warrant records are poorly maintained, for instance, might ask colleagues in different jurisdictions to make stops based on those records; if a record proves to be erroneous, evidence stemming from the stop might still be admitted in court. Even the potential for such "working arrangements" should be unacceptable. As LaFave explains:

> [I]t is undeniable that if police officers lacking reasonable suspicion or probable cause may nonetheless bring about *Terry* stops and full-fledged arrests, respectively,

> merely by getting some other officer [in a different jurisdiction] to do the dirty work, and may then use any incriminating evidence obtained incident to such unjustified seizures, the day will have finally arrived when the Fourth Amendment is truly nothing more than 'a form of words.'

LaFave, *supra*, §1.8(e)(4), at 315 (internal quotation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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MAY 16, 2008

PETITION FOR RE-HEARING

07-
No. 513

Supreme Court, U.S.
FILED
FEB - 9 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BENNIE DEAN HERRING,

Petitioner,

v.

UNITED STATES,

Respondent.

MOTION TO REHEAR

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MOTION TO REHEAR

Comes now Bennie Dean Herring (Herring) who resides in the state of Alabama and the county of Coffee, moving this court to reconsider its opinion of January 14, 2009. In support of Herring states the following.

BACKGROUND

1. This case began July 7, 2004, when Coffee County deputy Mark Anderson arrested Herring and placed him in the Coffee County Jail under the misdemeanor charge of carrying a concealed weapon.

2. Almost a year later, June 6, 2005, Herring was arrested on a federal warrant, for the same occurrence, and returned to the Coffee County Jail.

3. Herring's federal arrest was pursuant to Title 18 USC 922(g)(1), felon in possession of a firearm.

4. Herring was placed in the Coffee County Jail pursuant to the federal warrant with a "no bond" restriction. Federal Marshals filed a detainer on him at the jail June 7, 2005. While there he was indicted in the Southern Division of the Middle District on June 29, 2005.

5. Herring remained continually confined from June 7, 2005 until June 6, 2008, being denied both bail, an initial appearance, detention hearing and preliminary hearing, eventually serving thirty-six (36) months on a twenty-seven (27) month sentence. (His first appearance was an arraignment before a Federal Magistrate August 17, 2005.)

6. During the time Herring was preparing for trial and attempting to perfect his appeal, June 7, 2005 through December 20, 2006, he was moved thirteen (13) times by Federal Marshals and others.

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7. Marshals would move Herring and not allow him to take along his files even though they knew he was proceeding pro se.

8. Eventually, on June 23, 2006, marshals moved Herring, leaving his file in Coffee County where jail officials destroyed it.

9. Herring was handcuffed and shackled at all pretrial hearings, distracting him mentally and preventing his ability to manage his files.

10. His ability to manage his case was made impossible by the constant relocating performed by Federal Marshals. He was placed in the Coffee County Jail twice, the Montgomery City Jail twice, the Autauga-Metro Jail twice, the Elmore County Jail twice, the SHUE at the USP in Atlanta for a month locked down twenty-four hours, seven days a week, the holding facility in Oklahoma City, the SHUE at the medium facility in Yazoo City, Mississippi, and the FCI Low there, back to Coffee County in November, back to the medium SHUE at Yazoo City and finally to the FCI Low.

11. Herring wrote the Court of Appeals (COA) and asked that his case be submitted, on the record because of the constant relocation. COA doc 4-7-06

12. Instead the COA appointed appellate counsel for Herring.

13. When Herring found out of the appointment, he wrote the attorney a letter setting out areas he wanted to challenge in the appeal.

14. Because of being denied bail and the constant moving, Herring never met the attorney, and only talked to him three times for a few minutes each

15. The petitioner raised the lack of jurisdiction both personal and subject matter at the first appearance ten (10) weeks after his arrest June 7, 2005. he continued to

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challenge it at every opportunity in subsequent hearings and motions. The government never responded with proof to the contrary.

LACK OF JURISDICTION

TWO PREDICATE CRIMES WERE VACATED

PURSUANT TO 18 USC 921 (a)(20)(B)

16. The 922(g)(1) case was based on two satellite descrambler cases from and1990.

17. After being convicted in the first case, a panel of the Eleventh Circuit reversed it June 17, 1991, U.S. v. Herring, et. al., 933 F 2d 131, for insufficient evidence that Herring et. al., violated the charged statute, 18 USCA 2512 (1)(b), the wire tap statute. The opinions circulated and were published.

18. The government moved the COA for en banc consideration, which was denied August 2, 1991.

19. On November 5, 1992, fifteen months later, without a motion from either party, the COA sua sponte vacated the panel opinion, reheard the case en banc and affirmed the District Court's judgment, U.S. v. Herring, et.al., 1993 F. 2d 784.

20. Nine months later the District Court imposed the sentence of Bennie Dean Herring only. There has yet to be a final order disposing of the entire case from the District Court.

21. In February of 1994, Herring moved the District Court for relief pursuant to 28 USC 2255. At that time he was serving a sentence at Maxwell Air Force Base in the federal camp there, for the 18 USC 2512 (1)(b) conviction and a companion case involving the same conduct.

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23. Five years later August 15, 1998, the Magistrate Court construed the second petition to amend the first and recommended it be denied.

24. The District Court adopted the Magistrate's recommendation October 26, 1998.

25. Herring then appealed the denial and on October 21, 1999, the COA VACATED and REMANDED, in part, to the District Court, for further proceedings, 98-6830 (11th Cir.). On February 1, 2000, the COA issued the mandate. When no hearing was set eleven (11) months later, Herring moved the District Court for acquittal, January 8, 2001.

26. March 19, 2001, the Magistrate Court set a hearing, which was held on May 21, 2001.

27. The Magistrate Court never issued a recommendation and the petitioner believed the case to be over with after seventy days.

28. On October 7, 2005, before the first trial, Herring raised the issue of the vacated sentences, DC Doc. 30. On November 21, 2005, after the second trial, the District Court acknowledged the Magistrate's error, which occurred almost five years earlier, and informed Herring that the Magistrate would have a recommendation in the near future. However, it overruled Herring's objection to the use of the two vacated cases.

29. The Order to Vacate from the COA (11th Cir.) of October 21, 1999, remanded the two cases back to the District Court with the mandate issuing February 1, 2000, leaving their status as vacated through the filing of this petition.

30. Title 18 USC 921(a)(20)(B) excludes a vacated case from serving as predicate crime for the purpose of a prosecution pursuant to 18 USC 922 (g)(1).

TWO PREDICATE CRIMES NOT APPLICABLE

PURSUANT TO 18 USC 921(a)(20)(A)

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31. The acts involved in the two vacated cases are economic crimes that involve the unauthorized reception of satellite delivered television programming, essentially, a copyright infringement. They are charged under 18 USC 2512 (1)(b) and 47 USC 605 (705) (e)(4).

32. The statutory exclusion for both a vacated sentence and a trade crime is found at 18 USC 921 (a)(20)(A) and (B). (A) precludes economic type crimes and (B) precludes cases where the sentence has been vacated. The magistrate's failure to act along with the defining statute created a jurisdictional bar.

COMMERCE

33. Congress left out the term "interstate" as to possession by a felon, at 18 USC 922 (g)(1). That section criminalizes only for possession "in and affecting commerce," not interstate commerce.

34. A felon possessing a weapon in the same state as it was manufactured in would not be in violation of the statue otherwise. By leaving out "interstate" Congress attempts to criminalize intrastate possession of a weapon, one that has not crossed state lines.

35. Herring was not charged, in the indictment, with "affecting interstate commerce". However, at trial the government put an ATF employee on the stand and had him explain how interstate commerce was affected by a weapon crossing state lines. He went on to testify that the weapon found by Anderson under the seat of the truck was manufactured in Ohio and was seized in Alabama, logically, implying to the jury that it had to have crossed state lines.

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36. The trial court then constructively amended the indictment with instruction #II D.C. Doc #83 pg. 8. "The defendant can be found guilty of that offense if all of the following acts are proved beyond a reasonable doubt:

> First: That the defendant knowingly possessed a firearm in or affecting interstate commerce, as charged; and..."

The court then tied the testimony of the ATF agent and the theory, set out to the jury, by the government, defining a weapon crossing state lines as one that affects interstate commerce.

37. The petitioner believes 18 USC 922 (g)(1) to be unconstitutional at anytime it is charged as it was in this case. When a defendant is charged with only possession, under 922, "interstate" is left off denying authority to the Interstate Commerce Clause, thus, the jurisdiction of the District Court.

RIGHT OF A CITIZEN

38. The Fourteenth (14th) Amendment states that if a person is born in United States he is a citizen of the United States and the state where he resides.

39. The second Amendment provides that the right of the people (citizens of a state or nation) to keep and bear arms, shall not be infringed, indicating a pre-existing right.

40. The ninth amendment prohibits the use of any of the enumerated rights in the constitution to deny or disparage any right belonging to the people, before the constitution's ratification, and retained by them. That enumerated right being rights given to congress to create agencies and legislate to them authority over specific areas of government, in this case commerce between the states.

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right was in existence at the time the amendment was drafted (1791) and the ninth forbids any post-1791-infringements.

42. Herring was born in Barbour County, Alabama, is a citizen and has the right to keep and bear arms.

VENUE

43. The record is replete with Herring's objections, jurisdiction and venue. He was arrested 6-7-05 on a warrant supported by a affidavit signed by an ATF agent. The Complaint charged Herring with being a felon in possession of a weapon in the Southern Division of the Middle District of Alabama. He was then indicted in the Southern Division of Alabama. After being confined in Coffee County Jail for ten weeks, Herring was picked up by Federal Marshals and moved to Elmore County in the Northern Division of the Middle District. Although he was moved from jail to jail he remained in the Northern Division through two trials and sentencing.

44. Title 28 Section 81 sets the place of trial for acts committed in the Southern Division of Alabama in Dothan, Alabama. It is the place previously established by law for all trials unless for the convenience of the defendant and on his motion the trial is ordered moved.

CONCLUSION

45. This court made two observations during these proceedings that this petitioner totally agrees with and believes will eventually lead back to a truer constitutional government. They were; (1) the Fourth Amendment forbids unreasonable searches and seizures; (2) that redress for Fourth Amendment violations and application of the exclusionary rule are essentially different concepts.

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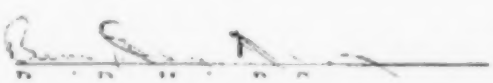
46. The Fourth Amendment implies no concern for the inclusion of evidence, any burden on the state as to the cost of excluded evidence, or the deterrent affect on police officers. It implies no concern for evidence at all. The Fourth Amendment is a guarantee to the individual that government "shall" not search or seize either property or person unreasonably.

RELIEF SOUGHT

47. The petitioner asks this court to rehear the case in whatever manner it deams appropriate and give new direction to the courts and enforcement agencies in a manner that will make it better for the next man up. The same thing has happened to man's law that happened to the scriptures when they were chopped up chapter, line and verse. A preacher can take a line from one verse then another and use it to relay any command he desires, the result being confusion. People then must go to the preacher for understanding. Their inherent direction, the one put in their heart compromised to the point it becomes unrecognizable. It is the compromise bringing about a new benchmark to be compromised further, thesis verses antithesis equaling synthesis.

48. The command at the Fourth Amendment is absolute. It forbids unreasonable seizure, the seizure of a person based on evidence seized as the result of two unreasonable acts almost a year earlier. The command must be understood to be directed at government. Not just Mark Anderson, but all of government. Good faith cannot become a vehicle for compromise.

49. Respectfully submitted this 9th day of February, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that all parties that have an interest in this matter have been served a copy of this filing by placing a copy in the U.S. Mail this 9th day of February, 2009.

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REPRODUCED BY THE GEORGIC ARCHIVES

CERTIFICATION

I Bennie Dean Herring am filing this Petition for Rehearing not to delay or waste the time of this court. I have filed it in good faith with the claims stated honestly to the best of my ability.

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MOTION

No. 07-543

IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, respondents respectfully seek leave to file the attached supplemental brief.

After oral argument in this case, on January 29, 2009, the President signed into law the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). The legislation was enacted to supersede this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and to clarify the time limits for filing compensation discrimination claims under Title VII of the Civil Rights Act of 1964.

Respondents respectfully request leave to file the attached supplemental brief addressing the effect of the Lilly Ledbetter Fair Pay Act on the proper disposition of this case.

Respectfully submitted,

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FEBRUARY 2009

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

In both this case and in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162 (2007), this Court has been called upon to grapple with two competing models for Title VII's treatment of past practices that have a subsequent effect on workers' compensation. On the one side is *Bazemore v. Friday*, 478 U.S. 385 (1986), which held that an employer committed a new violation of Title VII with each paycheck that reflected a discrepancy arising from discriminatory pay decisions made before the effective date of the Act. On the other side is *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), which held that a new unlawful employment practice does not arise every time an employee feels the present effect of a past unlawful employment practice.

Reasonable policy arguments can be made in favor, or against, either model as a basic framework for thinking about when the current compensation effects of past decisions and practices should be subject to present challenge under Title VII. At the time this Court decided *Ledbetter*, the text of the statute did not speak clearly to the question, leaving the Court to draw the line, as best it could, dividing cases subject to the rule of *Evans* and those falling within the broader rule of *Bazemore*. In *Ledbetter*, this Court followed the *Evans* model, holding that paychecks reflecting prior discriminatory pay decisions do not give rise to new violations of Title VII. 127 S. Ct. at 2171-72. The Court held that the model of *Bazemore* was reserved for a limited class of

cases in which an "employer issues paychecks using a discriminatory pay structure." *Id.* at 2174.

Congress responded by enacting the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) (LLFPA). After concluding that the decision in *Ledbetter*, "is at odds with the robust application of the civil rights laws that Congress intended," *id.* § 2(2), the statute provides, in most relevant part:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Id. § 3.

The new statute thus rejects *Evans*, and embraces *Bazemore*, as the proper model for addressing past discriminatory compensation decisions and other practices that have a subsequent effect on compensation. And in so doing, the Act confirms that respondents' claims in this case were timely and do not depend on a retroactive application of the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, § 995, 92 Stat. 2076.

I. The New Statute Applies To Respondents' Claims.

The new statute applies to this case.

1. Although the LLFPA was enacted after the conduct at issue here, Congress expressly applied it "to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 . . . that are pending on or after [May 28, 2007]." LLFPA § 6. In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), this Court recognized that such language unambiguously defines the temporal reach of the statute, obviating any need to rely on the presumption against retroactivity. *See id.* at 255-57, & n.8, 263, 280; *see also Martin v. Hadix*, 527 U.S. 343, 354-55 (1999); *Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 241-43 (1976).

2. Respondents' claims fall within the terms of the statute.

a. First, the Court has long recognized that "pension benefits . . . are 'compensation' under Title VII." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 712 n.23 (1978). In fact, the Act's findings demonstrate that Congress contemplated the Act's application to pensions, *see* LLFPA § 2(4), a fact that was much discussed during the debates on the bill. *See* H.R. REP. NO. 110-237,[1] at 18 (2007) ("House Report") (discussing Act's

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[1] This Report was generated when the Act was originally introduced in the 110th Congress. The current version was enacted without substantive change.

application to pensions); *id.* at 39-40, 45-46 (minority views) (same).

b. Moreover, the disparity in respondents' pensions "result[s] in whole or in part from" a "discriminatory compensation decision or other practice," within the meaning of the Act. LLFPA § 3. *See, e.g.*, 155 CONG. REC. H554 (statement of Rep. Nadler, co-sponsor of the Act) (explaining that "our use of the phrase 'discriminatory compensation decision or other practice' should be read broadly, and to include any practice—including, for example, *seniority or pension practices*—that impact overall compensation") (emphasis added).

Congress intended the phrase "discriminatory compensation decision or other practice" to encompass a "wide gamut of compensation practices," including, for example, "the fact pattern in Lædbetter, where sex-based performance evaluations were used in conjunction with a performance-based pay system to effectuate the discriminatory pay." House Report at 5; *see also* 155 CONG. REC. S756-57 (statement of Sen. Mikulski). Opponents of the bill unsuccessfully proposed amendments to delete the reference to "other practices," complaining that this "broad" language would subject too many employment practices to the expanded time limits of the bill. House Report at 41 (minority views); *see, e.g., id.* at 49-50 (describing rejected Keller Amendment); 155 CONG. REC. S697 (statement of Sen. Specter).

AT&T calculated respondents' pensions using a measure of company service that it knew afforded unequal credit for equal service to women who took pregnancy disability leave prior to 1978. That conduct is not meaningfully distinguishable from the

discrimination in *Ledbetter* (setting compensation in reliance upon a discriminatory measure of job performance, rather than company service), a practice this Court described as a "discriminatory pay decision." 127 S. Ct. at 2169. Moreover, Congress included the "other practice" language specifically to cover a practice that might not be considered a compensation decision in itself, but nonetheless "contributes to the employer's decision to set a worker's pay at a certain level," 155 CONG. REC. S757 (statement of Sen. Mikulski), in order to avoid the prospect that courts might employ a "hairsplitting definition of 'compensation decision,'" that would fail to reverse even the result in *Ledbetter* itself, House Report at 5; *see also* 155 CONG. REC. S756-57 (statement of Sen. Mikulski).

In this case, the Court need not explore the outer limits of the "other practice" category. Whatever nexus may be required between the "other practice" and compensation, the link in this case is direct, and certainly no more attenuated than that between performance evaluations and pay. Like performance evaluations, seniority credits are used to determine compensation, especially pensions. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766-67 (1976); Petr. Reply Br. 14. Indeed, in some circumstances setting compensation may be the *only* use of a seniority system, particularly if a small company does not have a competitive seniority system for distributing other kinds of job benefits, or if a larger company has separate seniority accrual rules for "benefit" and "competitive" seniority, *cf. Bowman*, 424 U.S. at 773 n.33.

The fact that AT&T uses the same seniority calculations for other purposes is immaterial – the same is true of performance evaluations, which are used in making promotion, layoff, and shift assignment decisions, as well as compensation decisions.

Indeed, the link between AT&T's discriminatory seniority practices and reduced compensation is even more direct than the connection between a performance evaluation and a pay raise decision. An employer ordinarily takes performance reviews into account as one of many factors in making what is often a highly discretionary decision on pay. Under AT&T's pension formula, however, every day of uncredited leave automatically results in a reduction in the worker's pension. *See* Petr. Reply Br. 14.

c. AT&T's claim that pregnancy discrimination was lawful at the time it adjusted respondents' NCS dates is both incorrect, *see* Resp. Br. 44-48, and irrelevant under the new Act.

By its terms, the LLFPA declares that every payment that gives effect to a prior "discriminatory compensation decision or other practice" constitutes a new unlawful employment practice. In this way, the LLFPA, like Section 706(e)(2) upon which it was modeled,[2] embraces and expands the *Bazemore* model of compensation discrimination. *See* House Report at 13; Resp. Br. 28. In *Bazemore*, the Court concluded

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[2] Unlike Section 706(e)(2), the LLFPA does not require that the past practice be (a) part of a "seniority system"; or (b) a form of *intentional* discrimination. *Compare* 42 U.S.C. § 2000e-5(e)(2) *with* LLFPA § 3, *see also* House Report at 13, 18-19.

that post-enactment implementation of a pre-Title VII discriminatory pay structure constituted a new act of intentional race discrimination subject to the present requirements of Title VII. 478 U.S. at 395-96. The fact that race discrimination was lawful when the pay was originally set meant that the employer was not liable for that pre-Act conduct. *Id.* at 395. But it did not insulate subsequent reliance upon that pre-Act discriminatory decision from post-Act review. To the contrary, the Court explained that each post-Act implementation of the discriminatory pay decision constituted a new act of illegal intentional race discrimination. *Id.* at 395-96.

The new legislation adopts the same approach and in so doing, implicitly rejects the view that implementation of a past pay decision or other practice is a nondiscriminatory act. *Cf. Ledbetter*, 127 S. Ct. at 2169-70. Instead, the LLFPA treats every application of a discriminatory compensation decision or other practice as a new act *imbued with the original discriminatory intent*. Thus, in this case, both the adjustment of respondents' NCS dates and AT&T's subsequent reliance upon that prior practice constitute acts of intentional pregnancy discrimination. The lawfulness of each – the denial of credit and the setting of the pension – is to be judged by the law as it stood at the time of each separate action.

II. Under the LLFPA, Respondents' Claims Are Timely And Do Not Require Retroactive Application of the PDA.

1. Because the LLFPA applies to this case, respondents' claims are timely. The time for filing an EEOC charge runs from the date upon which "the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The LLFPA declares that a new "unlawful employment practice occurs . . . each time wages, benefits, or other compensation is paid, resulting in whole or in part from" a "discriminatory compensation decision or other practice." LLFPA § 3. There may be some question whether pension benefits are "paid" with every pension check, or are considered "paid" only once at the time of retirement. *See* LLFPA § 2(4); House Report at 18. But respondents' claims would be timely under either view, as each plaintiff filed a charge within 300 days after being notified of her pension calculation. J.A. 41-47, 54 n.4.

2. The Act also makes clear that respondents' claims do not depend on a retroactive application of the PDA.

As discussed above, the LLFPA does not simply extend the statute of limitations for challenges to past discriminatory compensation decisions and other practices. Instead, it declares that reliance upon such decisions and practices constitutes a new and independent unlawful employment practice, occurring on the date the tainted compensation is paid. *See* LLFPA § 3. Applying the law in effect on the date the alleged unlawful employment occurred – here, Title VII as it stood when AT&T set

respondents' pensions, more than fifteen years after the PDA took effect – does not implicate any retroactivity concerns. *See* Resp. Br. 36-40.

In particular, it does not subject AT&T to liability for pre-PDA conduct. Instead, the effect of the LLFPA is to prohibit an employer from relying on past discriminatory compensation decisions or other practices in making present-day compensation payments. AT&T could have complied with this requirement by using a different, nondiscriminatory measure of company service when it calculated respondents' pensions or by revising their NCS dates to eliminate the discrimination.

In this way, the LLFPA operates much like Title VII's proscription against reliance upon the results of discriminatory employment tests. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). No one ever doubted that employers were prohibited from relying on such tests even if the tests were administered before the effective date of Title VII. Yet no one has ever suggested that precluding employers from relying on pre-enactment tests would give Title VII a retroactive effect. Precluding AT&T from relying on discriminatory measures of company service is no different.

Finally, Congress was well aware that the statute it drafted could subject employers to pension liability for which they had not been planning, a fact opponents emphasized repeatedly. *See, e.g.*, House Report at 45-46 (minority views); 155 CONG. REC. H115, H548 (statements of Rep. Kline); H121 (statement of Rep. McKeon); S712 (statement of Sen. Enzi). The plain text of the statute nonetheless clearly subjects employers to liability for relying upon

past discriminatory compensation decisions or other practices to tender workers reduced pensions. *See supra*, at 3-4.

III. Section 703(h) Does Not Preclude Application Of The LLFPA To This Case.

Nothing in Section 703(h) protects AT&T from application of the new statute.

1. Section 703(h) provides a defense for compensation disparities arising from "a bona fide seniority . . . system,"[3] but only if the disparity is "not the result of an intention to discriminate because of . . . sex." 42 U.S.C. § 2000e-2(h). The statute thus makes a critical distinction between cases in which a *neutral* seniority system perpetuates discrimination outside of the seniority system (*e.g.*, discriminatory refusals to hire or promote), and cases in which the rules of the seniority system are themselves discriminatory (*e.g.*, seniority systems that give half credit for equal work). *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 560 (1977).

Accordingly, Section 703(h) provides no defense to claims authorized by the LLFPA when a plaintiff challenges the present effects of intentionally

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[3] AT&T argued in its reply brief that the discrimination here arose not from the rules of its seniority system, but rather from its "leave policies." Petr. Reply Br. 2-4. In light of that position, AT&T should not be heard to assert that Section 703(h) has any application to this case. At the same time, whether AT&T's discriminatory rules are properly called "leave" or "seniority" rules makes no difference to the question of whether they constitute an "other practice" under the LLFPA.

discriminatory seniority rules, like the ones challenged here.

2. AT&T has argued that at the time the seniority accrual decisions were made, discrimination on the basis of pregnancy was not considered to be a form of intentional sex discrimination under Title VII. Petr. Reply Br. 6-8. But that assertion is of no benefit to AT&T, for two reasons.

First, the LLFPA makes clear that AT&T is not being held responsible for its accrual decision many years ago, but rather for its post-PDA decision to *give effect* to those discriminatory crediting decisions through the payment of pensions that are the "result[] in whole or in part" of a prior "discriminatory compensation decision or other practice." LLFPA § 3. And, as explained above, under the LLFPA, the law imputes to AT&T's pension-setting decision the intent behind the prior "discriminatory compensation decision or other practice" to which it gives effect. That is, because the pension-setting decision gives effect to a practice (*i.e.*, the pre-PDA accrual rules) that intentionally discriminated on the basis of pregnancy, the pension-setting decision is treated as a current act of intentional pregnancy discrimination as well. And at the time AT&T calculated respondents' pensions, pregnancy discrimination indisputably constituted intentional sex discrimination.

Second, Section 703(h) was never intended to protect intentionally discriminatory seniority systems simply because the discrimination may have been lawful at the time the system was adopted or initially applied to a worker. Section 703(h) provides no shelter, for example, to an employer who pays

diminished pensions to black workers hired before 1964 because they accrued no seniority before Title VII took effect. In the language of the statute, the resulting disparities in pensions plainly are "the result of an intention to discriminate because of race, color, religion, sex, or national origin." Section 703(h). Notably, this language does not include the word "unlawful." It is enough that present difference in treatment is the result of prior racial discrimination within the seniority system itself. Indeed, to hold otherwise would render the proviso largely meaningless. If the difference in treatment is the result of an *unlawful* intention to discriminate, then the employer can make no claim that it has acted "pursuant to a bona fide seniority . . . system" in the first place. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 355-56 (1977).[4]

IV. The Court Should Either Affirm In Light Of The LLFPA Or Remand To The Court Of Appeals For Consideration Of The Act's Effect In The First Instance.

For the foregoing reasons, the judgment below should be affirmed in light of the LLFPA. In the alternative, rather than construing the statute in the first instance on the basis of truncated briefing – and without the benefit of oral argument or the views of other courts, the EEOC, or the Solicitor General – the

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[4] Moreover, as discussed in respondents' prior brief, Section 703(h) does not apply to PDA claims, or to facially discriminatory seniority systems such as AT&T's. Resp. Br. 51-53.

Court may wish to consider simply vacating the judgment of the court of appeals and remanding the case for reconsideration in light of the new legislation. *See, e.g., Beltran v. Myers*, 451 U.S. 625 (1981); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Morris v. Schonfield*, 399 U.S. 508 (1970).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, sitting en banc, should be affirmed, or vacated and remanded for reconsideration in light of the LLFPA.

Respectfully submitted,

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APPENDIX

Lilly Ledbetter Fair Pay Act of 2009

One Hundred Eleventh Congress

of the

United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the sixth day of January, two thousand and nine

An Act

To amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lilly Ledbetter Fair Pay Act of 2009".

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.

SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following:

"(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

"(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.".

SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended—

(1) in the first sentence—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(B) by striking "(d)" and inserting "(d)(1)";

(2) in the third sentence, by striking "Upon" and inserting the following:

"(2) Upon"; and

(3) by adding at the end the following:

"(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.".

SEC. 5. APPLICATION TO OTHER LAWS.

(a) AMERICANS WITH DISABILITIES ACT OF 1990.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5).

(b) REHABILITATION ACT OF 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to—

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

(c) CONFORMING AMENDMENTS—

(1) REHABILITATION ACT OF 1973.— Section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)) is amended—

(A) in paragraph (1), by inserting after "(42 U.S.C. 2000e-5 (f) through (k))" the following: "(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)".

(2) CIVIL RIGHTS ACT OF 1964. — Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended by adding at the end the following:

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.".

(3) AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.—Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.